

The Hashtag Hustle

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The Hashtag Hustle

Law and Policy Perspectives on Working in the
Influencer Economy

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1. Introduction: The multifaceted nature of the book's phenomenon

Taylor Annabell, Christian Fieseler, Catalina Goanta and Isabelle Wildhaber

1 POSITIONING INFLUENCER LABOUR: BETWEEN SOCIETAL AND LEGAL IMPLICATIONS

The meteoric rise of the content creator economy has redefined several industries, such as entertainment, consumer and marketing. Beyond that, it has also reshaped the careers and career aspirations of many hopefuls. Influencing has evolved into a social media reflection of our worlds and professions. It is no longer limited to the classic celebrity full-time influencer. Now, everyday professionals, whether they be lawyers, electricians, kindergarten teachers, construction workers or journalists, are currently working at the intersection of offline and online – a development referred to as the ‘influencer creep’.¹ They describe, live and share their professions and experiences on social media, often using it as a new marketing channel, and entering into what this book calls the *hashtag hustle*. Many hobbyists exist now at the periphery of the influencer economy, displaying their creativity online in the hopes of making a living from the business of influence by becoming internet famous.²

A career within social media becomes a real possibility for the select few who manage to fill a niche or break into some form of stardom. However, the real outliers are those who manage to expand beyond the entertainment shores of the industry and into genuine entrepreneurial pursuits. Apart from earnings facilitated by social media platforms, creators have been diversifying their

¹ Sophie Bishop, ‘Influencer Creep: How Artists Strategically Navigate the Platformisation of Art Worlds’ (2023) *New Media & Society*.

² Gillian Brooks, Jenna Drenten and Mikolaj Jan Piskorski, ‘Influencer Celebriification: How Social Media Influencers Acquire Celebrity Capital’ (2021) 50 *Journal of Advertising* 528.

portfolios with skincare and makeup lines, crypto-businesses, apps, games, and a wide range of products.³ One notable example is Mr Beast, the highest grossing influencer of 2022 according to *Forbes*, who rose to fame with his elaborate giveaways and challenges.⁴ He is also projected, by the same publication, to become the first billionaire YouTuber.⁵ Notwithstanding success stories, the business of influence remains vaguely regulated and fraught with legal risks and exploitation opportunities. What might have begun as aspirational work, a hobby performed for the sake of expression, has now become a full-time occupation demanding due care by both participants and regulators.

The influencer economy has evolved into a phenomenon that resists simple categorisations. It is increasingly difficult to distinguish creative labour from pure marketing, or in other words, the production of original ‘authentic’ content from integrated sponsored and monetised content.⁶ In this regulatory limbo, what thrives is an array of entrepreneurial opportunities only limited by the imagination of its partakers. From the evils of exploitative labour⁷ of non-consenting minors⁸ and influencer-driven scams to the uplifting power of communities organising for the greater good: the online space facilitates it all.

³ Steffi Cao, Matt Craig and Alexandra S. Levine, ‘Forbes Top Creators 2023’ (*Forbes*, 2023) <https://www.forbes.com/sites/stevenbertoni/2023/09/26/top-creators-2023/>, accessed 23 June 2024.

⁴ Ibid.

⁵ Ibid.

⁶ See for instance Arunesh Mathur, Arvind Narayanan and Marshini Chetty, ‘Endorsements on Social Media: An Empirical Study of Affiliate Marketing Disclosures on YouTube and Pinterest’ (2018) 2 Proceedings of the ACM on Human-Computer Interaction 1.

⁷ See for instance Zoë Glatt, ‘The Platformised Creative Worker: An ethnographic study of precarity and inequality in the London influencer industry’ (*LSE theses*, 2023) https://etheses.lse.ac.uk/4577/1/Glatt_the-platformised-creative-worker.pdf, accessed 23 June 2024.

⁸ Valerie Verdoodt, Simone van der Hof and Mark Leiser, ‘Child Labour and Online Protection in a World of Influencers’ in Catalina Goanta and Sofia Ranchordás, *The Regulation of Social Media Influencers* (Edward Elgar 2020). See also Allie Volpe, ‘How Parents of Child Influencers Package Their Kids’ Lives for Instagram’ (*The Atlantic*, 28 February 2019) <https://www.theatlantic.com/family/archive/2019/02/inside-lives-child-instagram-influencers/583675/>, accessed 23 June 2024; Chase DiBenedetto, ‘A New Washington State Bill Takes the First Step in Legislating Rights for Child Influencers’ (*Mashable*, 17 February 2023) <https://mashable.com/article/child-influencer-washington-state-bill>, accessed 23 June 2024; Emmanuel Dunand, ‘A Bill Passed to Regulate the Videos of Children “Influencers”’ (*Web24 News*, 13 February 2020) <https://www.web24.news/a/2020/02/a-bill-passed-to-regulate-the-videos-of-children-influencers.html>, accessed 23

Yet, the spectrum of hobby/professionalisation can be deceiving in terms of economic expectations. The economic significance of influencer labour tends to go in three main directions. The first one is the *startup phase*, where labour might be geared towards a creator career, but the volatility of the business makes it difficult for individuals to establish themselves with full intentionality. From a legal perspective, this can be the case of creators who are active on social media without any type of legal blanket in the form of registration or incorporation of their economic activity. Here we also note the highest propensity of legal vulnerabilities, given the generally low legal literacy levels of the aspirants to influencer status. The second direction of influencer labour is the *small entrepreneur phase*, where creators see their economic activities thrive and may register as freelancers, also known as self-employed professionals.⁹ Such a registration may bring some tax benefits, or other subsidisation schemes meant to support personal entrepreneurialism.¹⁰ Registering oneself as a freelancer entails some degree of formality and interaction with public authorities in a given jurisdiction, that it should have an impact on raising awareness that such economic activities have legal implications. These implications do not solely pertain to the creator's patrimony, but also extend towards their clients or consumers. This phase does not per se make it easy to navigate the legal web of obligations, but it can be considered as a starting point for a creator's legal visibility. Lastly, the third phase is the *empire phase*, where creators' success warrants the consolidation of a sophisticated corporate structure. Here we can speak about creators as CEOs, who establish networks of businesses used to diversify their economic revenue, coupled with more serious acknowledgements and awareness of legal obligations.

The reason why these three phases are important is to bring to light the clash between cultural authenticity and legal reality. As individuals nurturing parasocial relationships with their fan base, influencers present their intimacies as individuals, when instead the legal connotations of their activities have them labelled as professional parties. In consequence, whether they are aware of this or not, influencers need to comply with a vast volume of rules, such as media law, consumer protection, financial law, tax law, etc.

June 2024; 'Inside the Lives of Child Instagram Influencers – The Atlantic' <https://www.theatlantic.com/family/archive/2019/02/inside-lives-child-instagram-influencers/583675/>, accessed 23 June 2024.

⁹ See for instance the Dutch government, 'Regulations for Self-Employed Professionals' (Overheid, 2024) <https://business.gov.nl/starting-your-business/starting-as-a-self-employed-professional/regulations-for-self-employed-professionals/>, accessed 23 June 2024.

¹⁰ Ibid.

To make matters even more complex, all these phases reflect the reality that influencer labour currently tables a portfolio approach to business models: creators earn advertising revenue, they sell goods and services, they get money from creator funds, or they get live donations from their audiences in the form of microtransactions. All these revenue models happen at the same time, and they can be said to reflect a level of coping with the volatility of social media platforms, their rankings and engagement pitfalls.

Influencer labour has been thoroughly addressed in the context of the inequalities amplified by platforms and other capitalist actors in the social media ecosystem.¹¹ The scholarship provides a rich critique of how profit maximisation in this market often attracts precarity and discrimination, but it does so in general isolation from the legal realities that have shaped individual protections aimed at making market conditions fairer for the smaller participants such as consumers. This discussion raises intriguing legal questions regarding working as an influencer and how to conceptualise, analyse and apply legal regimes to the broad entrepreneurial portfolio of volatile creative work within the ‘hustle’ of the creator economy. Such questions can reflect the uncertainty around the qualification of influencer labour, as well as the very characteristics of this labour.

2 NEW THOUGHTS – HOW THIS BOOK EXTENDS SCHOLARSHIP

A sizable number of creators managed to develop their content creation into genuine careers – an accomplishment achieved despite influencer labour traditionally being viewed through the lens of media work, as aspirational, but unpaid labour. A focus on labour in media and communication studies has pushed back against the de-legitimisation of the work that influencers do and sought to characterise intentional practices and strategies that typify work

¹¹ Angèle Christin and Yingdan Lu, ‘The Influencer Pay Gap: Platform Labor Meets Racial Capitalism’ (2023) *New Media & Society*; Mariah L Wellman, ‘What It Means to Be a Bodybuilder: Social Media Influencer Labor and the Construction of Identity in the Bodybuilding Subculture’ (2020) 23 *The Communication Review* 273; Grant Bollmer and Katherine Guinness, *The Influencer Factory: A Marxist Theory of Corporate Personhood on YouTube* (Stanford University Press 2024); Lin William Cong and Siguang Li, ‘A Model of Influencer Economy’ (*National Bureau of Economic Research*, May 2023) <https://www.nber.org/papers/w31243>, accessed 23 June 2024; Zoë Glatt and others, ‘A Good Life? Critical Feminist Approaches To Influencer Ecologies’ (2020) *AoIR Selected Papers of Internet Research* <https://spir.aoir.org/ojs/index.php/spir/article/view/11120>, accessed 23 June 2024.

in the industry. In doing so, scholars have developed concepts of particular forms of unpaid labour enacted by influencers including ‘aspirational’, ‘visible’, ‘relational’, ‘immaterial’ and ‘aesthetic’. Here, we must tease out the particularities of practices that generate (perceived) value in the competitive marketplace of the attention economy characterised by changing algorithm recommender systems. Critically, this is labour that is not directly compensated but is part of understanding how influencers experience work and is considered necessary for earning revenue. Thus, scholars approaching labour from this (often Marxist) perspective have critically examined the instability and precarity of labour conditions, power dynamics between influencers and platforms, agencies and advertisers along with inequalities of gender, race and class that affect algorithmic visibility and monetisation opportunities.¹²

Another challenge is the noticeable imbalance of earnings captured by the social media platforms and the users that actually generate their content. These professions exist in a fraught relationship with platforms and other forms of intermediaries such as agencies. While content creators depend on platforms to host their content and agencies to connect them to paid opportunities, they are also the ones to hold the power of influence. Creators that are aware of their position in the industry are characterised by attempts to diversify their entrepreneurial portfolio, expanding beyond platform-based content and minimising their dependency on these platforms.

The dynamic between creators, platforms, and labour has many parallels to earlier discussions on the gig economy and the uncertainty of digitally mediated, on-demand employment. Existing labour laws cover a lot of the ground in this area, even if different jurisdictions come to different conclusions. To understand the symbiotic nature of the relationship between platforms and influencers, it is possible to borrow from the debate surrounding gig workers. However, for those outlier-influencers who manage to professionalise their labour, an added level of complexity is introduced. Holding real influence over a dedicated audience comes with certain obligations, does it not? Agencies, platforms and creators themselves are often severely unaware of their contractual obligations and the status of their working relationships. A situation aggravated by the culture of secrecy in the industry. Specific figures and obligations are mostly locked under confidential bilateral agreements.

The goal of the book is to shed light on the cultural, economic and legal aspects of content creation as labour, including concerns over working conditions, worker protection, and the status of the working relationship. The differing conceptions of influencer labour across disciplines present two opposing, yet complementary, sides of work: labour as an invisible and underappreciated

¹² Ibid.

effort made by influencers, and labour as economic enterprise. On the one hand, influencers carry out a range of unpaid, free practices in the hopes of monetising their content. This work provides content that benefits audiences and platforms, the latter of which is integral to the advertising business model of the platform. On the other hand, when approaching the influencers who earn revenue (due to the success of their unpaid labour practices) by monetising their content and brand, thereby becoming economic actors, they are subject to legal regimes that regulate not only their working conditions, but also stipulate certain obligations for the protection of consumers.

Legal research has covered some of the implications of influencer labour on children as vulnerable participants in this economy.¹³ Nonetheless, the legal framework applicable to influencer labour in jurisdictions around the world remains a considerable research gap, particularly when linked to the social and cultural implications of the underlying norms. This is due to the entrepreneurial consequences of identity commodification. A wide range of influencers have found themselves in the business of monetising their living experience. Exercising this type of labour can blur the lines between work and play as well as public and private – especially for children. Against the background of a fast-moving digital market, legal scholarship has lagged in the classification and clarification of the legal implications of influencer labour.

This book provides an in-depth understanding of the basic tenets of content monetisation from the perspective of content creators and influencers, who often engage in this space with two overlapping identities: a personal, individual identity speaking to social media's current need for relatability and authenticity, as well as a professional entrepreneurial identity. These two dimensions often bring legal tensions, such as the legal qualification of labour and transactions, and lead to important questions relating to creator culture and marketing. The resulting exploration builds on the earlier volume on the regulation of social media influencers, which took a legally horizontal approach to identifying what legal issues can affect the activity of influencers.¹⁴

3 RESEARCH QUESTIONS AND CONTRIBUTIONS

The goal of this edited volume is to better understand the situation of influencer labour by studying the convergence of media studies, law/regulation and economics. In that effort, it reports and synthesises the vast trends and themes reflected by existing research on the cultural production of content.

¹⁴ Catalina Goanta and Sofia Ranchordás, *The Regulation of Social Media Influencers* (Edward Elgar 2020).

It will then match these findings to the relevant applicable legal frameworks. Generally, this edited volume purports to address three main questions: (i) What are the characteristics of content creation as labour? (ii) What comprises the influencer/creator hustle? What are the implications of content monetisation for influencers and content creators? (iii) How do different jurisdictions around the world deal with influencer labour from a legal perspective, and are current laws sufficiently flexible to reflect the influencer/creator hustle? These three research questions reflect the three separate parts of the book, which is structured as follows.

Part I deals with how identity is built in the influencer economy by and through the commodification and monetisation of digital labour. It reflects an exploration of the multifaceted characteristics of influencer labour, marked by both aspects of commodification and qualification. On one side of the spectrum, for many moderately successful creators, aspects of commodification loom, where individuality becomes second to exchangeable marketing vehicles, tightly governed by industry conventions and contractual obligations enforced by overbearing agencies. In turn, the social and economic expectations from the influencer status have changed dramatically over the years. Even the term ‘influencer’ is perceived as a pejorative term which indicates the prioritisation of commercial gain over authenticity. Influencers are increasingly seen as individuals who lend or sell their opinions and their likeness in exchange for financial gains. It has long been possible, at least in principle, for some creative influencers to approach their work as assets. However, the actual realisation of profits challenges their identity: they are no longer merely the individuals with whom audiences develop intimate parasocial relationships, but they are vehicles of commercial transactions. This marks a transition from a private individual to a commercially registered market actor. Part I brings together three contributions which showcase the wide variation of influencer identities, as well as practices that establish these identities across different groups, geographies, and trends.

Veronica Barassi explores the practice of ‘sharenting’ and the boundaries between parent and child identity that become blurred in terms of privacy, liability and agency for children. By reflecting on the notion of ‘visibility’ as a social category, this chapter revisits these ongoing debates, delving into the complexities that have arisen at a historical juncture where social media data is not merely utilised by artificial intelligence (AI) agents to profile individuals but also serves as the basis for generative AI, capable of producing convincing deepfakes.

Lucia Bainotti provides an investigation of how small content creators (also known as micro-influencers) navigate the complexities and nested precarities of the influencer industry by combining multiple activities, roles, or jobs across various fields or sectors in what she calls ‘composite careers’. The

chapter presents the results of a qualitative investigation based on interviews with micro-influencers. The findings describe three categories of content creators, each embodying a particular composite career: the full-time content creator, the multitasker, and the passionate second-shifter.

Sijun Shen and **Crystal Abidin** delve into the phenomenon of *wanghong* (网红), which translates to ‘internet red’ and approximates to a Chinese interpretation of ‘influencer’. The term is used in the Chinese social media industry to refer to internet fame obtained through a variety of means, but usually focused on monetising potential, an important field of inquiry in global influencer studies. This chapter examines two case studies of *wanghong* who were embroiled in prolific scandals situated within the backdrop of *wanghong* governance in the Chinese market. These case studies highlight the strategies and labour of *wanghong* in their attempts to survive scandals and leverage crises as opportunities within China’s precarious digital economy.

Part II of the book tackles its core concept, namely the social media hustle undertaken by influencers/creators. The hustle reflects the entrepreneurial dimensions of content creation, as well as some of the incentives of the actors engaging in it. Related to influencer labour in academic research, an underexplored consideration is the increased competition in this landscape. In the era of authenticity, the size of one’s following is no longer more important than the genuine connections established with their community. A legion of micro (or even nano) influencers is taking over the space once occupied by a select group of mega-influencers. Issues relating to perceived stagnation, or the (shadow-) banning of content need to be considered against this background: the more creators there are, the smaller the market shares they may acquire. At the same time, while parasocial relationships drive creator communities, an important role in these relationships is played by the attraction (physical and psychological) that content creators stimulate in their communities. In this context, the sexualisation of influencer presence on social media may be interpreted as a recipe for popularity.

Influencer labour is nearly ubiquitous across online spaces and industries. In some ways, influencers are involved in supply chains and power imbalances which are reminiscent of the gig economy. Concurrently, the experience of content creators with algorithmic amplification is often determined by what research has called ‘brand safety’, that is, what content is considered inoffensive to the reputation of brands that may want to associate with the platform (or the influencer). Controversial content creators and controversial content are defined, identified and taxed by platforms by means of visibility and accessibility. This results in some virality approaches being detrimental to selected creators. What is defined as offensive is also a point of contention, as many non-white creators report disproportional flagging of their content. And here is the reality of content creation: while, in theory, anyone with a camera

and internet access can partake in the creator economy, not all creators are promoted equally by platforms and within monetisation ecosystems. In Part II, we bring together analyses of entrepreneurship focused on economic incentives, platform and self-governance, and content moderation.

In his chapter, **Daniel Ershov** reviews recent theoretical and empirical studies in economics and management that model the behaviour of content creators and consumers on social media, and that assess the potential effects of regulations on incentives and outcomes in this market. These studies highlight several mechanisms through which certain forms of advertising transparency regulations could distort content creator incentives and ‘backfire’. Empirical evidence from Instagram users in Germany following the strengthening of disclosure regulations provides some evidence for these mechanisms.

Laura Aade analyses how platform discretion in content moderation can pose a threat to streamers who use (or used) to earn their living on the live-streaming platform, by focusing on an empirical study on Twitch streamers. The chapter draws on data gathered from ten semi-structured interviews and addresses the material and immaterial harms that can arise from an abrupt and unilateral termination of affiliate or partnership agreements by Twitch. In doing so, the chapter reveals the contractual and legal frameworks that led to the development of platform discretion in content moderation.

Ziying Meng presents a hybrid approach of digital ethnography and a participant-led comparative walkthrough to showcase an investigation of 16 content creators’ cross-platform work and labour conditions in navigating multiple Chinese and US-based platforms. This research is situated in the context of the Chinese *wanghong* economy and social media entertainment built around Silicon Valley-based platforms. To deal with the challenges and maintain cross-platform autonomy, Ziying Meng shows how creators conduct self-governance tactics such as cross-platform profile management, self-curation of content, distribution and online performance, and navigate what she terms ‘platform poaching’.

Part III addresses some of the legal implications of influencer labour. Given its complexity and versatility, from a legal perspective, influencer labour has remained somewhat of a mystery. Although regulators around the world are dedicating increasing attention to the question of how to regulate influencers, their attempts often reflect some degree of administrative fragmentation. Influencer labour can have implications for a plethora of legal frameworks and connecting enforcement structures. The most visible legal concern around influencers has been the protection of consumers through the disclosure of advertising. This perspective mostly took consumer interests into account, while vilifying – sometimes reasonably so – the practices of influencers as starting entrepreneurs. The web of rules applicable to influencing as a commercial activity is by no means simple or straightforward. Looking at influ-

encer labour from a more balanced perspective, considering both obligations and rights pertaining to this category of workers, is essential for the debate around the regulation of influencer activities, which has so far remained understudied from a multidisciplinary perspective. In Part III, we select specific jurisdictions that have seen a great rise in influencer marketing (India, Brazil) or where novel regulatory developments have raised a lot of public policy issues (France), to better understand what legal qualifications can be given to influencer labour, and what issues arise from this process. In addition, we also tackle the role of labour in competition from a platform governance perspective (EU).

Claire Marzo addresses the legal frameworks in France and the United Kingdom in terms of influencer labour and social protection. Although case law lags behind, rules tend to be general and apply to influencers. After having defined this activity and considering the diversity of influencers' profiles, the chapter sheds light on the applicable legal regimes to influencer labour.

Malcolm Katrak and **Shardool Kulkarni** tackle the Indian approach to regulating influencer labour, which reveals an emphasis on the obligations of influencers, particularly those regarding disclosures in the context of consumer protection, whilst paying little attention to the protection of their fundamental rights at work as self-employed workers. Policy decisions, such as the ban imposed on TikTok by the Indian government in 2020 without accounting for the livelihoods of numerous working-class influencers, also reflect a disregard for their rights. This chapter seeks to situate the failure to regulate influencer labour in a uniquely Indian context of pervasive informality despite a constitutional mandate for socioeconomic justice.

Andreia de Oliveira provides an analysis of Brazil's burgeoning digital influencer market, including patterns of consumer behaviour and salient regulatory issues. Her chapter delves into the substantive regulatory framework affecting the industry, touching on aspects of consumer protection laws, tax legislation, advertising protocols, and the related oversight by national authorities. Additionally, the chapter reflects on previous and ongoing initiatives to establish regulations specific to digital influencers.

Finally, **Tjaša Petročnik** looks at the supranational level and discusses content creation as digital labour to explore to what extent selected EU regulatory frameworks – platform regulation, consumer protection law, and competition law – are fit to address the exploitation concerns related to the business model of digital platforms and the way in which value thereon is created and realised. In particular, the chapter finds that EU regimes predominantly facilitate fairness in a procedural sense, especially by ensuring more transparency, and highlights the possible, if contested, role of antitrust in ensuring a fairer distribution of value on digital platforms.

4 FUTURE RESEARCH

The contributions collected in this book reflect two specific trends brought to light by the complexity of content creation. First, there are significant doubts relating to the value of influencer labour, particularly the economic value of this activity. Should the time invested in professionalisation be considered as time that warrants compensation? Does it make sense to have different regimes applicable to, for instance, influencers as startups and other startups that might have the same investment of social capital, but without any claims for economic reimbursement? Was entrepreneurialism ever fair, and if we accept a negative answer to this question in the light of the nature of capitalism, should resulting inequalities be remedied? Second, looking at regulation as an intervention that can provide such remedies, what should be an ideal path for lawmakers to bridge eventual deficiencies? Are freelancers the new companies participating in the digital market, and should they benefit from harmonised protections across cultural and legal internet and physical geographies?

These questions are tricky to answer in a reality where creators as entrepreneurs are the victims, but also the winners, of capitalism, and the physical borders of their activity remain difficult to determine and impose. Such questions pave the way towards a broader research agenda on the legal and economic status of influencers, particularly from the perspective of fairness in the digital marketplace. We hope this volume fuels an initial multidisciplinary discussion that can benefit from further insights.

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PART I

A theoretical framework for influencer labour

2. Amplified visibility: Critical reflections on children's social media presence, sharenting and tech-abuse in the age of generative AI

Veronica Barassi

1 INTRODUCTION

In March 2024 a bill was presented in the Lower House of the Italian Parliament to create a new law that protects the image of minors on social media. The proposed law has been designed especially with reference to parent bloggers – and the influencer industry – and politicians and the media often referred to the infamous example of the influencer Chiara Ferragni (29 million followers) and her ex-husband Fedez (14 million followers), who started posting and capitalising on their children's images from the first ultrasounds. The proposed law in Italy requests that (a) parents inform the Italian Communication Authority (AGCOM) when they want to use the image of their children for profit, (b) devolve part of the income to their children's bank account, and (c) respect their children's right to be forgotten if required. Overall, the proposed legislation marks an important step in the direction of working towards better protection for children who are exposed to the practices of parent bloggers and influencers. However, for someone like me, who has been researching the problem of *sharenting* for ten years, the proposal seems to be a step which 'is too little and too late', and does not address the new important questions that have emerged with reference to the social media presence of children in the age of generative AI – a topic I discuss in this chapter.

The term 'sharenting' originated from a cross between the words share and parent and was coined in 2012, allegedly by the *Wall Street Journal*, to describe parents who shared too much information about their children on

social media.¹ Since then, the term has spread rapidly internationally, and has very often been used to talk about the risks associated with this practice, such as the problem of cyber grooming, identity theft, or more generally, the risks to children's privacy. Much of the earlier debates focus on sharenting as a 'problem', citing research such as that conducted by the Family online Safety Institute (FoSI) in the US, which argued that nearly 20% of parents share information online about a child which they may find embarrassing in the future.² Since then, much research has emerged about the implications of the process of sharenting. Legal scholars, such as Steinberg and Bessant,³ have focused on the legal ramifications of these practices and have engaged with critical questions surrounding the privacy, liability, and agency of children. Other scholars, and especially sociologists and anthropologists,⁴ have also considered the complex ways in which the social media practices of parents reflected processes of identity construction,⁵ or gave rise to complex processes of reflection and negotiation in family life.⁶

This chapter revisits these ongoing debates, delving into the complexities that have arisen at a historical juncture where social media data is not merely utilised by artificial intelligence (AI) agents to profile individuals, but also serves as the basis for generative AI, capable of producing convincing deep-fakes. The main influence and inspiration for this chapter is the *Child Data Citizen*, an ethnographically informed research project which I conducted

¹ Allison Lichter, 'Oversharenting: Parents Juggle Their Kids' Lives Online' (*Wall Street Journal*, 16 May 2012).

² Anna Brosch, 'When the Child Is Born into the Internet: Sharenting as a Growing Trend among Parents on Facebook' (2016) *The New Education Review* 225.

³ Stacey B Steinberg, 'Sharenting: Children's Privacy in the Age of Social Media' (2017) 66 *Emory Law Journal* 839; Claire Bessant, 'Parental Rights to Publish Family Photographs versus Children's Rights to a Private Life' (2017) 28 *Entertainment Law Review* 43.

⁴ Alicia Blum-Ross and Sonia Livingstone, '"Sharenting," Parent Blogging, and the Boundaries of the Digital Self' (2017) 15 *Popular Communication* 110; Veronica Barassi, 'BabyVeillance? Expecting Parents, Online Surveillance and the Cultural Specificity of Pregnancy Apps' (2017) 3 *Social Media + Society*; Carol Moser, Tianying Chen and Sarita Y Schoenebeck, 'Parents' and Children's Preferences About Parents Sharing About Children on Social Media' (2017) *Proceedings of the 2017 CHI Conference on Human Factors in Computing Systems*.

⁵ Blum-Ross and Livingstone (n 4); Barassi, (n 4).

⁶ Moser and others (n 4); Davide Cino, 'Beyond the Surface: Sharenting as a Source of Family Quandaries: Mapping Parents' Social Media Dilemmas' (2022) 86 *Western Journal of Communication* 128.

between 2016 and 2019. The project aimed to investigate the complex relationship between the datafication of childhood and the emergence of new forms of datafied citizenship.⁷ The ethnographic element of the project consisted of *auto-ethnography*, *participant observation*, and *digital ethnography*. As the mother of two young girls (one was two years old when the project started, and I was about to become pregnant with my second one), I documented the lived and sensory experiences of the datafication of children from a parent's perspective. The *Child Data Citizen* project also relied on the collection of 50 semi-structured in-depth interviews with parents living in London and Los Angeles with children from 0 to 13 years of age (whose personal information is regulated by the Children's Online Privacy Protection Rule (COPPA)⁸). Although the project was largely ethnographic in scope, it was also influenced by the belief that one of the most fundamental problems with ethnographic research is the fact that it rarely engages in an analysis of political, economic and technological structures.⁹ It is for this reason that I also carried out a 'platform analysis' of four social media platforms (Facebook, Instagram, Snapchat, Twitter); ten apps (baby apps and pregnancy apps); four home hubs; and four AI toys. The platform analysis consisted of mapping exercises of the business models and political economic networks of the platforms studied and in the qualitative textual analysis of their promotional cultures and their data policies.

This chapter is of course influenced by the *Child Data Citizen* project, yet it aims to bring together its findings with my subsequent research on the democratic impact of AI technologies (*The Human Error Project*) as well as with the literature research that I am currently conducting for a new project on tech terror and intimate violence in family life (*Intimate Tech Terror*). The chapter will argue that the convergence of sharenting practices and the rise of AI technologies, especially generative AI, has amplified the risks associated with children's online presence, raising profound concerns about not only the right to self-expression and self-determination, but also the right to be protected from violence and abuse. As we navigate this intricate landscape, it is imperative to explore how the intersection of sharenting and generative AI introduces new dimensions to the discourse on privacy, ethical considerations,

⁷ Veronica Barassi, 'Datafied Times: Surveillance Capitalism, Data Technologies and the Social Construction of Time in Family Life' (2020) 22 *New Media & Society* 1545.

⁸ 'Children's Online Privacy Protection Rule ("COPPA")' <https://www.ftc.gov/enforcement/rules/rulemaking-regulatory-reform-proceedings/childrens-online-privacy-protection-rule>.

⁹ Veronica Barassi, 'Datafied Citizens? Social Media Activism, Digital Traces and the Question about Political Profiling' (2016) 1 *Communication and the Public* 494.

and the evolving nature of familial relationships in the digital realm. This chapter aims to analyse the intensified challenges posed by the synthesis of social media and generative AI, with a particular focus on the impact on children's autonomy and rights in an era where the digital footprint extends well beyond the boundaries of the real.

2 SHARENTING: SOCIAL MEDIA, DIGITAL SELF AND THE QUESTION ABOUT CHILDREN'S PRIVACY

The rise of social media has brought about unprecedented possibilities for digital storytelling online and self-expression. According to the theorist Stiegler,¹⁰ the great transformation of social media was that individuals were no longer only recipients of media messages – as used to happen in the context of mass communication – rather, they became the initiators.¹¹ For Stiegler, social networks have provided individuals with unprecedented ways to define their uniqueness and individuate themselves from others.¹² He recognised that the process of individuation could also have a narcissistic component.¹³ Yet to him, it was also related to radical and creative forms of self-expression and construction. The sociologist, although using different concepts, shared a very similar understanding.¹⁴ According to Castells, with the rise of social media, we have witnessed the emergence of a new form of communication: mass self-communication, endowing individuals with a new creative autonomy to express who they are.¹⁵ While, as argued elsewhere,¹⁶ Stiegler's and Castells' arguments can be particularly problematic for being too techno-optimistic, it is undeniable that social media platforms have become crucial spaces where people can tell personal stories and negotiate their position in society.¹⁷

¹⁰ Bernard Stiegler, 'Teleologies of the Snail: The Errant Self Wired to a WiMax Network' (2009) 26 *Theory, Culture & Society* 33.

¹¹ Ibid at 38.

¹² Ibid at 35.

¹³ Ibid at 42.

¹⁴ Manuel Castells, *Communication Power* (Oxford University Press 2009).

¹⁵ Ibid.

¹⁶ Natalie Fenton and Veronica Barassi, 'Alternative Media and Social Networking Sites: The Politics of Individuation and Political Participation' (2011) 14 *The Communication Review* 179.

¹⁷ Nick Couldry and others, 'Digital Citizenship? Narrative Exchange and the Changing Terms of Civic Culture' (2014) 18 *Citizenship Studies* 615; Sonja Vivienne, *Digital Identity and Everyday Activism: Sharing Private Stories with*

Self-construction, as the anthropology of personhood demonstrates, is a complex and open-handed process which enables us to negotiate our own sense of self-distinction or uniqueness from the group (*moi*) with the moral and cultural ideas of personhood (*personne*).¹⁸ It is primarily made possible through storytelling,¹⁹ and allows us to build an image of who we are and how we relate to others in society. The construction of the self on social media is tightly interconnected to the need to tell stories about ourselves in public and negotiate our position in the world. This need is particularly strong in the early days of parenthood. During the *Child Data Citizen* project, I met different parents who explained to me that for them it was important to post online, not only because they could 'stay connected with their families and friends', especially when they lived far away, but also because they could 'share their fears', or 'let people know that they were still fun even if they were parents'. In other words, their social media practices were key to negotiating their own identity and position in society. At times, these processes of mediation of the self online are the expression of a will to escape reality as it is, and not realistic representations of who people are. An example that I find very fascinating can be found in the research from Wang,²⁰ who spent 15 months doing ethnographic research in China on young women migrating from small villages to work in factories, which shows how these girls spent their free time posting glamorous photos of themselves on social media and telling stories that had nothing to do with the reality they were living.²¹

Whether realistic or mediated, the social media stories of parents cannot be perceived simply as narcissistic expressions. Yet, these practices are de facto problematic because, as Blum Ross and Livingstone showed in the early debates about sharenting, the boundaries of the digital self are weak and parents' right to self-expression directly impacts upon children's right to

Networked Publics (Springer 2016); Nancy Thumim, *Self-Representation and Digital Culture* (2012 edition, AIAA 2012).

¹⁸ Marcel Mauss, 'A Category of the Human Mind: The Notion of Person; the Notion of Self' in Michael Carrithers, Steven Collins and Steven Lukes (eds), *The Category of the Person: Anthropology, Philosophy, History* (Cambridge University Press 1985).

¹⁹ Jeff Pratt, *Class, Nation and Identity: The Anthropology of Political Movements* (Pluto Press 2003); Arturo Escobar, 'Identity' in David Nugent and Joan Vincent (eds), *A Companion to the Anthropology of Politics* (Blackwell Pub 2004).

²⁰ Xinyuan Wang, *Social Media in Industrial China* (UCL Press 2016).

²¹ *Ibid.*

privacy, as the narratives of one another always overlap and interconnect.²² In considering this question, legal scholars like Steinberg and Bessant²³ focused on the problem of consent, arguing that parents acted both as gatekeepers of their children's personal information and as narrators of their children's personal stories. This dual role of parents in their children's online identity, they argued, gave children little protection and acted against their best interest. In contrast to legal scholars, sociologists and anthropologists have shown how sharenting was actively being negotiated in family life. In 2017, for instance, Moser et al. from the University of Michigan published a study based on a survey of 331 parent-child pairs, which examined parents' and children's preferences about what parents should share on social media.²⁴ They demonstrated that children were okay with their parents posting 'cute' or 'fun family pictures' or 'pictures that made them look good'; they perceived these photos as flattering. Yet they were against parents posting 'embarrassing photos', 'ugly pictures or intimate photos' that show them for 'what they really are like at home'. Moser et al.'s work is particularly fascinating because it clearly showed that families were strategically thinking about their own social media practices and negotiated consent with their children. In his sociological work on sharenting, Cino defines these practices of negotiation and critical reflection as social media dilemmas that have come to define family life.²⁵

Although it is crucial that we move away from approaches that blame parents for their social media practices or see parents as careless when posting, and that we carefully consider how these issues of consent are being negotiated in family life, it is also important that we carefully consider and understand the complexity and the risks associated with the high visibility of children's data in the age of generative AI.

3 HIGH VISIBILITY: UNDERSTANDING THE COMPLEXITY AND RISKS OF CHILDREN'S SOCIAL MEDIA PRESENCE

When we think about the implications of sharenting, we are confronted with the fact that the visibility of the self on social media is an extremely problematic phenomenon that escapes the control of parents and exposes them and their children to multiple impacts, effects, and risks. If we really want

²² Alicia Blum-Ross A and Sonia Livingstone S, "'Sharenting,' Parent Blogging, and the Boundaries of the Digital Self" (2017) 15 *Popular Communication* 110.

²³ Steinberg (n 3); Bessant (n 3).

²⁴ Moser and others (n 4).

²⁵ Moser and others (n 4) and Cino (n 6).

to understand this complexity, we need to explore the concept of *visibility* as understood in the social sciences and media and communication research. According to Brighenti,²⁶ visibility can and should be understood as a sociological category, because it plays a fundamental role in the making of our social worlds. As Brighenti explains, visibility is simultaneously *relational, strategic and processual*.²⁷ It's relational because it determines relationships between seeing and being seen or, more generally, between noticing and being noticed. The relationship of looking at each other constitutes the site of mutual recognition, misrecognition or denial of recognition of the other – in short, the site where we constitute ourselves as 'subjects'.²⁸ Such relationships define subject positions, and one can only become a subject within such relationships.

Visibility is often also strategic because it can be, and often is, manipulated by subjects who try to enhance, diminish or control their own visibility. Social media self-representation is often strategically mediated, as people rely on media influences, gender stereotypes or specific understandings of the political self in the building of their online profiles. When parents share their pictures and stories online, they often have strategic goals in mind about the ways in which they would like to appear or they want to represent their children. The problem with social media presence, however, emerges because visibility is not only relational and strategic, but it is also always *processual*, because it's defined by high levels of indeterminacy and unpredictability as subjects do not control its outcomes or effects.²⁹

The understanding of the multidimensional complexity of visibility also presupposes that we treat visibility both as *a condition of publicness* and as *a form of mediation*, and that we appreciate how the rise of social media has radically transformed how visibility operates within society.³⁰ Brighenti argued that new media are arenas of pluralised visibilities. But such a pluralisation has also entailed new rules of intervisibility ranking and indexing.³¹ Meikle also talks about the new complexities introduced by visibility on social media, and he argues that these platforms have introduced a new ethics of visibility,

²⁶ Andrea Mubi Brighenti, *Visibility in Social Theory and Social Research* (Palgrave Macmillan UK 2010).

²⁷ Ibid.

²⁸ Ibid at 27.

²⁹ Ibid 39.

³⁰ Samuel Mateus, 'Visibility as a Key Concept in Communication and Media Studies' [2017] *Estudos em Comunicação* 109; Graham Meikle, *Social Media: Communication, Sharing and Visibility* (Routledge 2016).

³¹ Brighenti (n 26) at 96.

because every time we make ourselves visible, we also determine the visibility of others, with key implications for their public selves.³²

In understanding the visibility of the digital self on social media, we need to be aware of its intrinsic complexity and this complexity needs to be acknowledged in any debate about sharenting. The *relational aspect of visibility* reminds us that the self-construction of parents online always entails the construction of the digital identities of their children. Leaver was perhaps one of the first researchers focused on family life that identified the problem. According to him, one of the key problems of discussions on online identity at the time was the assumption that users have an agency in the shaping of their digital profiles, as this did not take into account the fact that on social media, digital identities are not only constructed by the subject/user but are often constructed by others.³³ Also, Blum-Ross and Livingstone, as mentioned above, explored the relational aspect of the digital self by arguing that the narratives of parents constantly overlapped with those of children, making it difficult to determine whose narrative was being shaped and whose identity.³⁴

The relational aspect of visibility also enables us to understand that identity and self-construction online should not only be thought of in terms of practices of social media posting, but also in relation to more internal processes of imagination of one's sense of self and positioning in society in relation to the visibility of others. In this regard, the high visibility of others on social media can be extraordinarily impactful on the well-being of children and adolescents, who find themselves negotiating with mediated, and often unrealistic, images of others on social media. A study of 1,153 adolescent boys and girls has shown how social media can lead to forms of body dissatisfaction in both genders.³⁵ Other studies have shown how exposure to the mediated, and often unrealistic, representations of others on social media can have a profound impact on mental health and self-esteem.³⁶ In a study on how 11–16-year-olds in three European countries (Italy, UK and Spain) construct their social iden-

³² Meikle (n 24) at 92.

³³ Tama Leaver, 'Researching the Ends of Identity: Birth and Death on Social Media' (2015) 1 *Social Media + Society*.

³⁴ Blum-Ross and Livingstone (n 2).

³⁵ An T Vuong and others, 'Social Media Use and Body Dissatisfaction in Adolescents: The Moderating Role of Thin- and Muscular-Ideal Internalisation' (2021) 18 *International Journal of Environmental Research and Public Health* 1322.

³⁶ Deborah Richards, Patrina HY Caldwell and Henry Go, 'Impact of Social Media on the Health of Children and Young People' (2015) 51 *Journal of Paediatrics and Child Health* 1152; Elena Bozzola and others, 'The Use of Social Media in Children and Adolescents: Scoping Review on the Potential Risks'

tity, Mascheroni et al. show how the exposure to the mediated visibility of others is impacting teenage girls, who find themselves posting provocative photos to conform to sexualised stereotypes and be socially accepted by their peers.³⁷

The *strategic aspect of visibility* sheds light on the precariousness and unpredictability of individual strategies of self-construction on social media. As Thumim has shown, the political economic context of social media often influences and constrains the strategies of self-representation online.³⁸ In addition, as demonstrated by Cover, on social media we construct our digital story through selfies, posts, and updates; we also build it through networking practices, becoming friends with others, liking, commenting, and interacting with the content posted by our friends and acquaintances.³⁹ The problematic aspect of these practices is the fact that they are often reactive, not conscious and voluntary. Our digital self therefore is often created *a posteriori*, and this makes it extraordinarily complex for individuals (children and adults alike) to control their self-representation online.

One fundamental problem that emerges with the lack of control is the collapse of contextual integrity as defined by Helen Nissenbaum. On social media, in fact, we are not in control of the processes that our visibility and that of others (e.g. our children) triggers in different contexts.⁴⁰ One image shared amongst a group of peers can trigger specific positive effects; this does not imply that the same image shared in other contexts will have the same positive outcomes. The lack of control over children's data is not only defined by examples of techno-abuse or data misuse, but also by the multiple instances in which children's social media data is collected, stored, and analysed by AI technologies and automated algorithms. In fact, we need to realise that these technologies have led to the 'amplification' of the visibility of children's data in the public realm and have increased parents' lack of control over this data.

(2022) 19 International Journal of Environmental Research and Public Health 9960.

³⁷ Giovanna Mascheroni, Jane Vincent and Estefania Jimenez, "Girls Are Addicted to Likes so They Post Semi-Naked Selfies": Peer Mediation, Normativity and the Construction of Identity Online' (2015) 9 *Cyberpsychology: Journal of Psychosocial Research on Cyberspace*.

³⁸ Thumim (n 17).

³⁹ Rob Cover, 'Performing and Undoing Identity Online: Social Networking, Identity Theories and the Incompatibility of Online Profiles and Friendship Regimes' (2012) 18 *Convergence* 177.

⁴⁰ Helen Nissenbaum, 'A Contextual Approach to Privacy Online' [2011] *Daedalus. Journal of the American Academy of Arts & Sciences*.

This leads us to the last aspect of visibility, the processual aspect. According to Brighenti, as mentioned above, visibility is processual because we cannot determine its effects on us and others. This is particularly clear if we think about the fact that visibility on social media always entails the collapse of contextual integrity. According to the privacy and law scholar Helen Nissenbaum, when people emphasise the importance of privacy, it is not because they want to hide aspects of themselves from the public, but because they want to limit the flow of personal information depending on the context.⁴¹ Nissenbaum defines this need to choose our personal information based on the context as the right to contextual integrity. The processual aspect of visibility enables us to highlight the fact that we are not in control of the processes that our visibility and that of others triggers in different contexts.

4 AMPLIFIED VISIBILITY: AI TECHNOLOGIES AND THE IMPACTS OF CHILDREN'S DATA

In 2015/16 I launched the *Child Data Citizen* project, influenced by debates on the rise of predictive analytics and surveillance capitalism.⁴² I was very much interested in the study of how the everyday life of children was being exposed to steeply growing and complex processes of datafication.⁴³ Like other social anthropologists, I was not only interested in understanding how the rise of big data and AI were effectively becoming a new form of knowledge and meaning construction transforming cultural life,⁴⁴ but also how they were interconnected with the discourses and structures of surveillance capitalism.⁴⁵ Above

⁴¹ Ibid.

⁴² Frank Pasquale, *The Black Box Society: The Secret Algorithms That Control Money and Information* (Reprint edition, Harvard University Press 2016); Shoshana Zuboff, 'Big Other: Surveillance Capitalism and the Prospects of an Information Civilization': (2015) 30 *Journal of Information Technology* 75.

⁴³ Veronica Barassi, *Child Data Citizen: How Tech Companies Are Profiling Us from Before Birth* (MIT Press 2020).

⁴⁴ Tom Boellstorff, 'Making Big Data, in Theory' (2013) 18 *First Monday*; Tom Boellstorff and Bill Maurer (eds), *Data: Now Bigger and Better!* (Prickly Paradigm Press 2015); Paul Dourish, 'Algorithms and Their Others: Algorithmic Culture in Context' (2016) 3 *Big Data & Society* 1; Nick Seaver, 'Algorithms as Culture: Some Tactics for the Ethnography of Algorithmic Systems' (2017) 4 *Big Data & Society* 1.

⁴⁵ Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (PublicAffairs 2019).

all, however, my main concern was with understanding the multiple ways in which people were negotiating with this techno-historical transformation.⁴⁶

At the time, debates about the datafication of children were just emerging. In their insightful article on the datafied child, Lupton and Williamson mapped the multiple technologies that collect, share and process personal information of children, and they came to the conclusion that we were witnessing a time of ‘unprecedented capacities for monitoring children’.⁴⁷ Much of their argument is based on the critical communication and sociological literature that emerged in the last few years, which explores the complex relationship between digital surveillance and the rapid proliferation of big data in everyday life.⁴⁸ By drawing on the work of Bauman and Lyon on ‘liquid surveillance’,⁴⁹ which describes surveillance as ungraspable and defined by a velocity of movement and the invisibility of agents practising it – as well as the work of others that emphasise the risk of this surveillance – the scholars argue that there are clear, material implications about the ways in which personal data is used to profile individuals,⁵⁰ including children. One aspect of the richness of their approach lies in the fact that Lupton and Williamson do not rely exclusively on political economic understandings of ‘dataveillance’, but they combine these understandings with the growing sociological literature on self-tracking and the quantification of the self.⁵¹ This leads them to conclude: ‘children become

⁴⁶ Sarah Pink, Debora Lanzeni and Heather Horst, ‘Data Anxieties: Finding Trust in Everyday Digital Mess’ (2018) 5 *Big Data & Society* 1; Paul Dourish and Edgar Gómez Cruz, ‘Datafication and Data Fiction: Narrating Data and Narrating with Data’ (2018) 5 *Big Data & Society* 1; Barassi (n 2).

⁴⁷ Deborah Lupton and Ben Williamson, ‘The Datafied Child: The Dataveillance of Children and Implications for Their Rights’ (2017) 19 *New Media & Society* 780, 783.

⁴⁸ Zygmunt Bauman and David Lyon, *Liquid Surveillance: A Conversation* (Polity 2012); Kate Crawford and Jason Schultz, ‘Big Data and Due Process: Toward a Framework to Redress Predictive Privacy Harms’ (2014) 55 *Boston College Law Review* 93; Jose van Dijck, ‘Datafication, Dataism and Dataveillance: Big Data between Scientific Paradigm and Ideology’ (2014) 12 *Surveillance & Society* 197; David Lyon, ‘Surveillance, Snowden, and Big Data: Capacities, Consequences, Critique’ (2014) 1 *Big Data & Society* 1.

⁴⁹ Bauman and Lyon (n 48).

⁵⁰ Crawford and Schultz (n 48); Lyon (n 48).

⁵¹ Deborah Lupton, ‘M-Health and Health Promotion: The Digital Cyborg and Surveillance Society’ (2012) 10 *Social Theory & Health* 229; Deborah Lupton, ‘Quantifying the Body: Monitoring and Measuring Health in the Age of mHealth Technologies’ (2013) *Critical Public Health*; Deborah Lupton, ‘Quantified Sex: A Critical Analysis of Sexual and Reproductive Self-Tracking Using Apps. – PubMed – NCBI’ (2014) 17 *Culture Health and Sexuality* 440; Deborah Lupton,

datafied, they become “calculable persons”, they are not only the subject of calculations performed by others (and by other digital things) but are also enabled to think about, calculate about, predict and judge their own activities and those of others.⁵² Other scholars focused on the study of the datafication of children, and the normalisation of surveillance in everyday life⁵³ or the ways in which parents made sense of algorithmic logics.⁵⁴

In the study of the datafication of children and family life, I analysed different aspects. I engaged with critical debates about techno-dependency and data-tracking in family life,⁵⁵ and parental consent.⁵⁶ I also focused on the complex relationship between children’s data flows and the datafication of citizens from birth,⁵⁷ and discussed algorithmic inaccuracy, violence and data justice.⁵⁸ Yet amongst all the different issues that emerged during my research, perhaps the most important to the argument here was the critical understanding that we needed to move beyond the idea of ‘personal data’ as a unique umbrella term and to reflect on the different ‘typologies’ of data that are collected from family life, as well as on their different impact. In my work, I thus concentrated on four different types of data of children that were being produced and collected: health data, education data, home life data and, of course, social media data.

The Quantified Self (John Wiley & Sons 2016); Evgeny Morozov, *To Save Everything, Click Here: Technology, Solutionism, and the Urge to Fix Problems That Don’t Exist* (Penguin 2013); van Dijck (n 46); Kate Crawford, Jessa Lingel and Tero Karppi, ‘Our Metrics, Ourselves: A Hundred Years of Self-Tracking from the Weight Scale to the Wrist Wearable Device’ (2015) 18 *European Journal of Cultural Studies* 479.

⁵² Lupton and Williamson (n 47) at 787.

⁵³ Giovanna Mascheroni, ‘Researching Datafied Children as Data Citizens’ (2018) 12 *Journal of Children and Media* 517.

⁵⁴ Ranjana Das, ‘Parents’ Understandings of Social Media Algorithms in Children’s Lives in England: Misunderstandings, Parked Understandings, Transactional Understandings and Proactive Understandings amidst Datafication’ (2023) 17 *Journal of Children and Media* 506.

⁵⁵ Barassi (n 43).

⁵⁶ Veronica Barassi (n 9).

⁵⁷ Veronica Barassi, ‘The Child as Datafied Citizen: Critical Questions on Data Justice in Family Life’ in Giovanna Mascheroni, Cristina Ponte and Ana Jorge (eds), *Digital Parenting: The Challenges for Families in the Digital Age, Yearbook 2018* (Nordicom, University of Gothenburg 2018).

⁵⁸ Barassi (n 7); Veronica Barassi, ‘Algorithmic Violence in Everyday Life and the Role of Media Anthropology’, *The Routledge Companion to Media Anthropology* (Routledge 2022).

Social media data plays a fundamental role in the datafication of children, not only because social media practices – as we have seen above – are at the heart of everyday processes of self-construction and socialisation in family life, but also because developments in machine learning and deep learning have amplified the visibility of these data. We live in a world where automated algorithms scrape vast amounts of information on individuals through social media, and make predictions, and ultimately facilitate data-driven decisions about their lives. For years I researched and followed debates about how the data of children was being collected and used by big tech companies and their AI technologies. These debates have come to the fore, especially in recent years, with a rising growth in privacy scandals that involved the data of children and adolescents.

In October 2020, for instance, the Irish Data Protection Commissioner launched an investigation to shed light on Instagram's mishandling of minors' data. The inquiry stemmed from a complaint filed by David Stier, an American scientist who calculated last year that at least 60 million Instagram users under the age of 18 had the easy option to convert their personal profiles into business profiles. Instagram's business accounts require users to publicly display their phone numbers and email addresses, meaning that minors' personal data (email addresses, phone numbers, etc) was easily accessible online.⁵⁹ Other companies found themselves at the centre of privacy scandals and legal proceedings that involved children's data. In 2019, Google was fined \$170 million by the Federal Trade Commission because YouTube was accused of collecting data from children under 13 without parental consent and for creating personalised advertisements. The Federal Trade Commission highlighted the company's ambiguity, noting how YouTube boasted about its popularity among children to potential corporate clients, but refused to acknowledge, when questioned about COPPA, that certain parts of its platform were clearly directed at children.⁶⁰ The penalty was imposed just a few months after the Federal Trade Commission fined the Chinese giant TikTok \$5.7 million for collecting data from children under 13 without parental consent. As I write this chapter, a new case has been filed in April 2021 launched against TikTok in the UK on behalf of millions of children in the UK and the EU. The lawsuit alleges that the app is violating the UK and EU children's data protection laws. The goal is to stop the profiling of information for millions of children, have all

⁵⁹ BBC News, 'EU Investigates Instagram over Handling of Children's Data' (*BBC News*, 19 October 2020).

⁶⁰ Federal Trade Commission, 'Google and YouTube Will Pay Record \$170 Million for Alleged Violations of Children's Privacy Law' (*FTC*, 3 September 2019).

data collected on children under 13 since 2018 deleted, and seek compensation for families.⁶¹

The privacy scandals involving big tech, of course, shed light on some illegal misuses of children's social media data, but when we think about the implications (and sometimes misuse) of this data, we also need to take into account the multiple ways in which data brokers, insurers, government entities, and recruiters leverage social media data for data-driven decision-making processes and algorithmic profiling. As I argue in my research, in the age of surveillance capitalism, we need to be aware of the fact that the *data traces are made to speak for us and about them* in public. Hence, we are witnessing the rise of a new type of public self, the datafied citizen.⁶² In contrast to the digital citizen, who uses technologies to self-construct in public, the datafied citizen is defined by the narratives produced through the processing of data traces; it is the product of practices of inferred data and digital profiling. They are the very first generation of citizens who are coerced into digitally participating in society from before birth, through the production, gathering and processing of their data traces by others.⁶³

The rapid rise in the use of AI technologies within different areas of social life has thus amplified the visibility and social impact of children's data traces. Children's data traces are used by a plurality of stakeholders in a variety of contexts to make decisions about their lives. In my work, I have long focused on the social and democratic implications of these transformations and considered how profiling of children's data and structural inequalities can perpetuate and strengthen biases and discrimination.⁶⁴ Yet, as we shall see below, in the last year, the rise of generative AI technologies, and their rapid proliferation in everyday use, has profoundly amplified the risk of misuse of children's social media data. This is especially true if we consider the issue of deepfakes and synthetic content that extends well beyond the boundaries of the real.

⁶¹ Haroon Siddique, 'Case Launched against TikTok over Collection of Children's Data' (*The Guardian*, 20 April 2021).

⁶² Barassi (n 9); Veronica Barassi, 'Digital Citizens? Data Traces and Family Life' (2017) 12 *Contemporary Social Science* 84; Barassi (n 57).

⁶³ Barassi (n 9); Barassi (n 4); Barassi (n 43); Veronica Barassi, *I Figli Dell'algoritmo: Sorvegliati, Tracciati, Profilati Dalla Nascita* (LUISS University Press 2021).

⁶⁴ Barassi (n 7).

5 THE RISE OF GENERATIVE AI, DEEPPAKES AND THE QUESTION ABOUT TECHNO-ABUSE

In autumn 2023, Deutsche Telekom posted an awareness video titled, ‘Nachricht von Ella/Without Consent’. The video shows a couple walking down the street and the viewer is told that these are the parents of Ella, a 9-year-old, and they regularly post images of their daughter online without thinking about how these images will impact her future. The couple walks to the cinema, and there – to their dismay – they are confronted with a video message from an AI-generated grown-up version of Ella. The digital (and aged) version of Ella tells them that today, posting just a couple of images of children on social media can have dire consequences. She continues: ‘I know for you these are memories, but for others this is data and for me this may mean an ugly future, a future where my identity can be easily stolen.’ Ella starts to list the multiple ways in which this could happen, from someone using the voice or image of the girl to scam the parents to send money, to paedophiles using generative AI to produce pedo-pornographic content. The video is part of the ‘Share with Care’ campaign that is used to raise awareness of the risks intrinsic to the social media data of children in the age of generative AI. The Deutsche Telekom awareness campaign raises a crucial issue, which is the fact that we live in a world in which children’s data can increasingly be used to create deepfakes and other forms of synthetic content, and that this data can be used for violence and abuse.

Technology-facilitated violence and abuse (TFVA) is an emerging and problematic trend.⁶⁵ Research has shown that one of the main problems that arises from children’s social media presence is defined by the fact that it exposes them to different forms of abuse and violence. This is particularly true if we consider the rise in cyberbullying and hate crimes,⁶⁶ or if we think about how these technologies have enhanced domestic violence.⁶⁷ Other key

⁶⁵ Jane Bailey, Nicola Henry and Asher Flynn, ‘Technology-Facilitated Violence and Abuse: International Perspectives and Experiences’ in Jane Bailey, Asher Flynn and Nicola Henry (eds), *The Emerald International Handbook of Technology-Facilitated Violence and Abuse* (Emerald Publishing Limited 2021).

⁶⁶ Danielle Keats Citron, *Hate Crimes in Cyberspace* (Harvard University Press 2014); Anke Görzig and Lara A Frumkin, ‘Cyberbullying Experiences On-the-Go: When Social Media Can Become Distressing’ (2013) 7 *Cyberpsychology: Journal of Psychosocial Research on Cyberspace*; Wendy Craig and others, ‘Social Media Use and Cyber-Bullying: A Cross-National Analysis of Young People in 42 Countries’ (2020) 66 *Journal of Adolescent Health* S100.

⁶⁷ Michaela M Rogers and others, ‘Technology-Facilitated Abuse in Intimate Relationships: A Scoping Review’ (2023) 24 *Trauma, Violence, & Abuse* 2210;

problems can be found if we reflect on the issue of online grooming⁶⁸ and child pornography.⁶⁹

Rapid developments in machine learning techniques over recent years have escalated the sophistication of deepfakes and the creation of other forms of synthetic data.⁷⁰ In addition, we live in problematic information environments, profoundly impacted by fake news and disinformation,⁷¹ which facilitates the rapid and widespread diffusion, putting it into the hands of both sophisticated and unsophisticated actors.⁷² In thinking about this transformation, some scholars have argued that we are living in a post-factual society in which the perceived boundaries between fact and fake are increasingly blurred.⁷³ In their review, Chesney and Citron have highlighted the profound damages and impacts that deepfakes can have on our societies, organisations and individual identities. In this light, we need to understand that the damages to individuals,

Anastasia Powell and Nicola Henry, *Sexual Violence in a Digital Age* (Palgrave Macmillan UK 2017); Heather Douglas, Bridget Harris and Molly Dragiewicz, 'Technology-Facilitated Domestic and Family Violence: Women's Experiences' (2019) 59 *British Journal of Criminology* 551.

⁶⁸ Kim-Kwang Raymond Choo, 'Online Child Grooming: A Literature Review on the Misuse of Social Networking Sites for Grooming Children for Sexual Offences' (Australian Institute of Criminology 2009) Report; Amparo Elizabeth Cano, Miriam Fernandez and Harith Alani, 'Detecting Child Grooming Behaviour Patterns on Social Media' in Luca Maria Aiello and Daniel McFarland (eds), *Social Informatics: 6th International Conference, SocInfo 2014, Barcelona, Spain, November 11–13, 2014. Proceedings* (Springer International Publishing 2014).

⁶⁹ Pietro Ferrara and others, 'Online "Sharenting": The Dangers of Posting Sensitive Information About Children on Social Media' (2023) 257 *The Journal of Pediatrics*; Charlotte Yates, 'Influencing "Kidfluencing": Protecting Children by Limiting the Right to Profit from "Sharenting" Notes' (2023) 25 *Vanderbilt Journal of Entertainment & Technology Law* 845.

⁷⁰ Bobby Chesney and Danielle Citron, 'Deep Fakes: A Looming Challenge for Privacy, Democracy, and National Security' (2019) 107 *California Law Review* 1753; Alexander Godulla, Christian P Hoffmann and Daniel Seibert, 'Dealing with Deepfakes – an Interdisciplinary Examination of the State of Research and Implications for Communication Studies' (2021) 10 *SCM Studies in Communication and Media* 72; Jennifer Laffier and Aalyia Rehman, 'Deepfakes and Harm to Women' (2023) 3 *Journal of Digital Life and Learning* 1.

⁷¹ Alice Marwick and Rebecca Lewis, 'Media Manipulation and Disinformation Online' (Data and Society Research Institute 2017).

⁷² Chesney and Citron (n 70).

⁷³ Stephan Lewandowsky, Ullrich KH Ecker and John Cook, 'Beyond Misinformation: Understanding and Coping with the "Post-Truth" Era' (2017) 6 *Journal of Applied Research in Memory and Cognition* 353.

including children, can be varied and far reaching, because deepfakes can be used in multiple ways to harm people – from damaging one’s reputation and credibility to more profound forms of abuse and violence.

One key area of research that emerges within the deepfake literature is the understanding that deepfakes are, in the majority of cases, employed as instruments for technology abuse and violence against women and girls.⁷⁴ To convey the extent of these forms of abuse, Laffier and Rehman cite an inquiry that appeared on *Forbes*, which has shown that of 85,000 deepfakes circulating online, 96% depict non-consensual and sexually explicit content featuring women.⁷⁵ As Viola and Voto have shown, deepfakes have thus been at the heart of the increased production, and dissemination of non-consensual intimate images (NCII) of people.⁷⁶ The increased production of NCII and deepfakes has also directly involved the data of children. In fact, an investigation carried out by *Wired* in 2020 has shown that, amongst 104,000 fake nudes of women that had been created and shared without the consent of victims, were also images of girls under 18.⁷⁷ What is particularly concerning about the rise of NCII and deepfakes is the fact that, as a Graphika Report⁷⁸ has shown, between 2022 and 2023 these practices have moved from a custom service available on niche internet forums to an automated and scaled online business that leverages myriad resources to monetise and market its services. In fact, the report shows that a group of 34 synthetic NCII providers identified by Graphika received over 24 million unique visitors to their websites in September 2023. Additionally, the report also shows that the volume of referral link spam for these services has increased by more than 2,000% on platforms including Reddit and X since the beginning of 2023, and a set of 52 Telegram groups used to access NCII services contain at least 1 million users as of September 2023.

As I am writing this chapter, we are seeing a dramatic transformation in the ways in which the data of children can be used against them on a global scale. In fact, it is not surprising that toward the end of 2023, different newspapers in

⁷⁴ Chesney and Citron (n 70); Adam Dodge and Erica Johnstone, ‘Using Fake Video Technology to Perpetuate Intimate Partner Abuse’ (Without My Consent NGO 2017) Domestic Violence Advisory; Laffier and Rehman (n 63).

⁷⁵ Chenxi Wang, ‘Deepfakes, Revenge Porn, and the Impact on Women’ (*Forbes*, 2019).

⁷⁶ Marco Viola and Cristina Voto, ‘Designed to Abuse? Deepfakes and the Non-Consensual Diffusion of Intimate Images’ (2023) 201 *Synthese* 30.

⁷⁷ Matt Burgess, ‘The Biggest Deepfake Abuse Site Is Growing in Disturbing Ways’ (*Wired*, 2021).

⁷⁸ Santiago Lakatos, ‘A Revealing Picture’ (Graphika, 2023).

the UK, Italy and Spain⁷⁹ have discussed how, in schools, children are using NCII software to create child pornographic images. In this context, rather than focusing on issues such as sharenting – as the Deutsche Telekom advertising does – we need to redirect public debate and explore the responsibility of tech platforms and AI companies.

6 CONCLUSIONS

Social media, as we have seen in this chapter, has allowed unprecedented opportunities for self-expression and digital storytelling. Contrary to notions of narcissism or carelessness, the act of sharing pictures of children on social media platforms needs to be understood as providing key opportunities for negotiating parents' own sense of self and positionality in society. Yet, as we have seen, sharenting brings forth multifaceted challenges, particularly concerning the visibility of children's data. In fact, due to the relational, strategic, and processual complexities of visibility, it is almost impossible for parents and families to control the impacts and effects of children's data. By focusing on the complexity of social media visibility, however, this chapter aimed at moving beyond the focus on parents' practices to instead consider how the rapid rise in the use of AI technologies within different areas of social life has amplified the visibility and social impact of children's data traces. It has been shown that children's data traces are used by a plurality of stakeholders in a variety of contexts to make decisions about their lives and that this impacts their right to self-express and self-determine in public. It has also been argued that the rise of generative AI technologies, and their rapid proliferation in everyday use, has profoundly amplified the risk of misuse of children's social media data. This is especially true if we consider the issue of deepfakes and synthetic content that extends well beyond the boundaries of the real. The escalating sophistication of deepfakes and synthetic data, fuelled by rapid advancements in machine learning, poses significant risks for children. This transformation in technology has led to the widespread creation and dissemination of non-consensual intimate images (NCII), particularly affecting women and girls.

As this alarming trend unfolds, there is a pressing need to act now at different levels in society. Governments and regulatory bodies need to work on making more robust laws that are specially designed to address deepfakes and the production of synthetic media. Whilst these debates are emerging in different countries (e.g. US, Switzerland) and some regulations have been

⁷⁹ Tom Gerken and Joe Tidy, 'Children Making AI-Generated Child Abuse Images, Says Charity' (*BBC News*, 2023).

implemented, deepfakes and other synthetic media are often treated as low-risk (EU AI Act) and providers of these technologies are still largely unregulated (see the Online Safety Act in the UK). In this framework, we need to invest in more research that critically considers the complex relationship between users' practices and AI-enabled violence, as well as the role of tech platforms in enabling and deterring these forms of abuse. We also need tech platforms to work proactively not only on AI ethical codes, but in creating technological responses to the problem of misuse. These responses could take different forms and should include the design of special technological features or AI bots that prevent misuse.

In conclusion, it is clear that the example of sharenting and the influencer industry has taught us that regulations were too slow to adapt to the societal transformations brought about by social media. In the age of generative AI, we cannot afford such delay in addressing the problem, and we should work together as regulators, researchers, educators and tech developers to address the problem.

3. The composite careers of social media content creators: Labour, precarity and identity

Lucia Bainotti

1 INTRODUCTION

Social media content creators have long been struggling to gain recognition for the labour they invest in sharing their daily lives, fostering intimacies, and monetising content on social media platforms. While considered by part of the public opinion as pioneers in a new career path and embodying the ideal of a dream job for younger generations, content creators also face strong criticism, with detractors often accusing them of engaging in frivolous online activities and in the need to find a “real job”. However, existing scholarship highlights that content creators engage in intense forms of immaterial and emotional labour, which often are underpaid, when paid at all.¹ Moreover, it has been largely acknowledged that micro-influencers, like creative and cultural producers more broadly, navigate an unstable and unpredictable labour market, characterised by the dynamic evolution of social media platforms, the relentless platformisation of cultural production,² and opaque platform governance regulations.

All these elements contribute to the precarity and complexity inherent in the influencer hustle, challenges that are even more pronounced for content creators with a small to medium following (typically under 100k followers), also known as micro-influencers. Micro-influencers have gained prominence for their ability to establish genuine connections with their followers and provide

¹ Maurizio Lazzarato, ‘Immaterial Labour’ in Michael Hardt and Paolo Virno (eds), *Radical Thought in Italy: A Potential Politic* (University of Minnesota Press 1991); Arlie Russell Hochschild, *The Managed Heart: Commercialization of Human Feeling* (University of California Press 1983).

² Thomas Poell, David B Nieborg and Brooke E Duffy, *Platforms and Cultural Production* (Polity 2022).

authentic opinions on brands and products. Despite their growing importance, however, they face significant precarity, struggle to gain visibility and attention, and are easily replaceable by one of many other aspirational content creators. As a result, converting the influencer work into a profitable and stable occupation remains a significant challenge for this group of creators. Therefore, this chapter focuses specifically on micro-influencers with the aim of understanding how they navigate the complexities of their uncertain occupational situation by integrating social media content creation with a variety of other jobs and activities.

Arguably, the activity of content creator can be considered an occupation, as it represents a distinct area of tasks in the division of labour³ and “a set of jobs whose main tasks and duties are characterised by a high degree of similarity”.⁴ At the same time, however, the contours of this occupation have not yet been clearly defined, nor have the regulations for employment terms and compensation. Consequently, small content creators often operate in opaque working conditions and are not fairly compensated for their activities. On the contrary, they work in exchange for free goods and visibility, hoping that their effort will eventually lead to more stable, prestigious and remunerative jobs.⁵ To cope with this complex situation, small content creators resort to what I call “composite careers” – occupational trajectories characterised by the combination of diverse activities, roles, or jobs across multiple fields or sectors. As the empirical results will make clear, micro-influencers’ composite careers often blend traditional employment with freelance work, entrepreneurship, or other forms of work, allowing them to leverage their diverse skill sets and merge online and offline endeavours. By embracing these multifaceted careers, content creators aim to sustain their influencer roles while securing a livelihood, improving their quality of life, and attaining personal fulfilment.

This chapter aims, first, to outline the composite careers of small creators and contribute to a nuanced understanding of content creation as labour. While existing literature has focused on cross-platform labour and other strategies to navigate the precarity of the influencer industry,⁶ less attention has been paid

³ Andrew Abbott, ‘The Sociology of Work and Occupations’ (1993) *Annual Review of Sociology* 187.

⁴ International Labour Organisation, ‘International Standard Classification of Occupations (ISCO)’ <<https://ilostat.ilo.org/resources/concepts-and-definitions/classification-occupation/>> accessed 12 February 2024.

⁵ Brooke E Duffy, *(Not) Getting Paid to Do what You Love: Gender, Social Media, and Aspirational Work* (Yale University Press 2017).

⁶ See, e.g., Zoe Glatt, “‘We’re all told not to put our eggs in one basket’: Uncertainty, Precarity and Cross-platform Labor in the Online Video Influencer Industry’ (2022) *International Journal of Communication* 1.

to the constellation of activities and jobs that sustain small content creators and how these coalesce in particular life trajectories. Second, the research offers insights into how the ramifications of these trajectories shape the construction of content creators' identities in relation to labour and the shifts in subjectivity fostered by neoliberalism.

In what follows, I first set up the theoretical background for understanding content creators' composite careers and present the study's methodology. I then move to the analysis of the empirical results, exploring three categories of content creators, each embodying a particular composite career: (a) the full-time content creator; (b) the multitasker; and (c) the passionate second-shifter. The analysis offers insights into the strategies adopted by content creators to navigate an ever-more complex influencer industry, as well as a nuanced understanding of broader issues of labour, precarity and identity in the context of the platformisation of cultural production.

2 LABOUR, PRECARIITY AND SUBJECTIVITY IN THE PLATFORMISED INFLUENCER INDUSTRY

Over recent years, numerous researchers have shed light on the shifts brought about by the integration of digital platforms and their logic into the dynamics of cultural production, a process known as platformisation. Defined as “the penetration of economic and infrastructural extensions of online platforms into the web”, the concept of platformisation is useful to highlight how the production, distribution, and circulation of cultural content is contingent upon platforms' business models and data flows.⁷ The influencer industry represents a symptomatic example of platformised cultural production, as content creators are ever more dependent on metrics and analytics to create their content and on (self) optimisation practices to outsmart algorithms and avoid the threat of invisibility.⁸ These processes have further exacerbated the inherent precariousness of the cultural and creative industries, leading scholars to analyse the conditions of platformised creative workers in terms of “nested” precarities.⁹ This term is

⁷ David B Nieborg and Thomas Poell, ‘The Platformization of Cultural Production: Theorizing the Contingent Cultural Commodity’ (2018) *New Media & Society* 4275, 4276.

⁸ See, e.g., Lucia Bainotti, ‘From Attention to Affect: Gendered Practices of Status-Seeking among Instagram Content Creators’ (2024) *Celebrity Studies*. Sophie Bishop, ‘Managing Visibility on YouTube Through Algorithmic Gossip’ (2019) *New Media & Society* 2589.

⁹ Brooke E Duffy, Annika Pinch, Shruti Sannon and Megan Sawey ‘The Nested Precarities of Creative Labor on Social Media’ (2021) *Social Media + Society*.

useful to highlight that precarity can materialise at different levels, involving market dynamics, industry trends, and platforms' architectures and algorithms. What distinguishes these precarities is their interconnection, urging us not to view these elements in isolation but rather as deeply intertwined.

To navigate this landscape, content creators have learned to diversify their labour and income streams across various platforms and projects, aiming to mitigate risks in a rapidly evolving environment. As Glatt states, "[n]ot putting all your eggs in one basket has become a pervasive metaphor in the industry, with creators advised to avoid becoming too heavily dependent on any one platform or revenue stream in case it dries up".¹⁰ By allowing content creators to "multi-hom[e]"¹¹ and distribute their performances over multiple online venues, cross-platform labour offers the possibility of challenging their dependence on digital platforms. At the same time, however, multi-platform practices intensify the burden on content creators, multiplying their efforts and workload. Engaging across multiple platforms necessitates keeping up with emerging trends and algorithmic changes, while also engaging in additional forms of labour dictated by each platform's unique affordances and vernaculars.¹²

Scaraboto and Fisher aptly interpret these forms of cross-platform labour, shared by content creators, craft workers and artists, among other cultural producers, in terms of "restless platformance".¹³ This portmanteau of "platform" and "performance" describes practices aimed at "establishing and maintaining interconnected presences on multiple platforms beyond a focal market"¹⁴ by performing multiple roles within the platform system and adjusting strategies to each platform and role. Through forms of platformance, content creators strive to reassert control and authority over a bundle of interconnected practices, including creating, promoting and selling products, whose nature and temporality have been reconfigured by the process of platformisation. In this sense, platformance represents a dynamic practice seeking to reshape the field and empower content producers. However, while it allows content creators to maximise the possibilities offered by digital platforms, it also reaffirms their continued dependence on them.

¹⁰ Glatt (n 6) 9.

¹¹ Donato Cutolo and Martin Kenney 'Platform-dependent Entrepreneurs: Power Asymmetries, Risks, and Strategies in the Platform Economy' (2021) *Academy of Management Perspectives* 584.

¹² See, e.g., Leah Scolere, 'Brand Yourself, Design your Future: Portfolio-Building in the Social Media Age' (2019) *New Media & Society* 189.

¹³ Daiane Scaraboto and Eileen Fischer, 'Restless Platformance: How Prosumer Practices Change Platform Markets' (2023) *Marketing Theory*.

¹⁴ *Ibid* at 12.

For all these reasons, being a content creator is much more than simply creating and posting content online. In addition to content production, micro-influencers (as well as cultural producers more generally) are expected to act as entrepreneurs and acquire a range of “meta-competencies” such as broad creative abilities and business acumen.¹⁵ Content creators, especially those with smaller followings, undertake a myriad of responsibilities including financial management, public relations, audience management and promotion – all tasks typically handled by cultural intermediaries like production studios, publishing houses, or PR agencies.¹⁶ Furthermore, they often serve as their own stylists, makeup artists, photographers, and video makers, thus operating as one-person enterprises and navigating the delicate balance between amateurism and professionalism. This dynamic is characterised by what Abidin calls “calibrated amateurism”, where creators intentionally craft an aura of authenticity reminiscent of amateur aesthetic, whether or not they actually are amateurs.¹⁷ At the same time, however, they strive to maintain a professional image and produce high-quality content to remain competitive in the struggle for visibility and attention. Alongside efforts to preserve their authenticity and relatability, content creators also engage in a process of professionalisation that involves internalising market logics to produce cultural content, and aligning themselves and becoming integrated into the marketing and advertising industry.¹⁸

The situation is even further complicated by the fact that content creators are not only juggling multiple platforms and roles but, as the results will make clear, multiple jobs and activities across various fields and sectors. This reflection is crucial for contextualising content creators’ practices within the broader framework of neoliberal capitalism and entrepreneurial labour, which, together with processes of platformisation, has led to an intensification of the conditions of precarity.¹⁹

Content creators in a platformised industry share similarities with creative and media workers who engage in a double shift of “regular” and “creative” jobs to mitigate the risks of short-term, precarious and insecure work and

¹⁵ Elizabeth L Lingo and Steven J Tepper, ‘Looking Back, Looking Forward: Arts-based Careers and Creative Work’ (2013) *Work and Occupations* 337.

¹⁶ See, e.g., Stuart Cunningham S and David Craig, *Social Media Entertainment* (New York University Press 2019).

¹⁷ Crystal Abidin, ‘#familygoals: Family Influencers, Calibrated Amateurism, and Justifying Young Digital Labor’ (2017) *Social Media + Society*.

¹⁸ Loes van Driel and Delia Dumitrica, ‘Selling Brands While Staying “Authentic”: The Professionalisation of Instagram Influencers’ (2021) *Convergence* 66.

¹⁹ Poell et al. (n 2); Glatt (n 6).

fuel their creative careers. As existing research points out, workers in the creative and cultural industries often combine various creative projects with supplementary positions in teaching or the service sector to mitigate the risks of short-term, precarious, and financially unstable work.²⁰ Similarly, for a large number of small content creators, “second jobbing”²¹ represents the only way to make financial gain in an economy largely based on the display of consumption and the accumulation of consumer goods as a means of reward.²² Therefore, we can say that content creators embody what has been called the “slash generation”, comprising young professionals, usually belonging to the Millennial generation, whose careers are characterised by holding multiple job titles and specialising in multiple areas of expertise.²³ While existing research has already hinted at how fashion bloggers adopt similar strategies,²⁴ it is relevant to delve deeper into how small content creators mix various jobs to sustain their careers, as well as the implications of these constellations on the perception of their identity.

The relevance assumed by cross-platform labour, platformance, and second-jobbing highlights that despite the perceived coolness, freedom, and autonomy associated with “cool jobs” in “hot industries”,²⁵ there exists a hidden layer of intense pressure and constant self-monitoring imposed on creative labourers. Duffy and Wissinger posit that the narratives shared by bloggers, vloggers and Instagrammers concerning the fun and authentic nature of their “dream jobs” conceal the emotional labour and always-on mode of the neoliberal entrepreneurial labours.²⁶ The mythologies surrounding influ-

²⁰ See, e.g., Angela McRobbie, ‘Club to Company’ (2003) *Cultural Studies* 516.

²¹ Rosalind Gill, ‘Life is a Pitch: Managing the Self in New Media Work’ in Mark Deuze (ed), *Managing Media Work* (Sage 2010).

²² Lucia Bainotti, ‘How Conspicuousness Becomes Productive on Social Media’ (2023) *Marketing Theory*.

²³ Rachel Dresdale, ‘What are “Slash” Careers and Why You Need One (Forbes, 27 July 2017) <<https://www.forbes.com/sites/rachelritlop/2017/07/27/what-are-slash-careers-why-you-need-one/?sh=5fe7d7f23bf6>> accessed 12 February 2024.

²⁴ Duffy (n 5).

²⁵ Gina Neff, Elizabeth Wissinger and Sharon Zukin ‘Entrepreneurial Labor Among Cultural Producers: “Cool” Jobs in “Hot” Industries’ (2005) *Social Semiotics* 307.

²⁶ Brooke E Duffy and Elizabeth Wissinger, ‘Mythologies of Creative Work in the Social Media Age: Fun, Free, and “Just Being Me” (2017) *International Journal of Communication* 4652.

encer labour contribute to the formation of a creativity *dispositif*²⁷ that “both disciplines and incites contemporary cultural labourers, offering models for success—as well as a promise of hope—in an otherwise bleak employment landscape”.²⁸

The notion of creativity *dispositif*, together with its encouraging rather than coercive nature, aligns with the emerging paradigms of governmentality that shape cultural and creative labour and foster novel forms of worker-subjectivity.²⁹ The ideal, neoliberal worker-subject is characterised by flexibility, self-direction, propensity for self-commodification, and self-discipline. As Gill notes, in this context, life itself becomes a perpetual pitch for the worker subject, where the value they are ascribed is intricately tied to the perceived quality of their work.³⁰

The figure of the ideal subject-worker is crucial to illuminate the interplay between subjectivity and work, revealing how individuals are not only influenced by but also actively participate in the construction of the neoliberal ethos that governs the contemporary cultural and creative industries. First, it is important to notice that individuals’ subjectivity is “put to work”, as their success hinges on personal effort, the expression of their “true self”, and the commodification of their everyday lives and intimacies. All these elements are evident in content creators’ activities, especially in the constant tensions between private and public, authenticity and self-promotion, creativity and commerce.³¹ Furthermore, new forms of subjectivities are formed in relation to labour, or, in some cases, by taking distance from it. As Gill and Pratt claim, “to understand emergent subjectivities [...] centrally requires attention to the meanings cultural workers themselves give to their life and work”.³²

The present research embraces this perspective and explores how different configurations of labour can reinforce and reiterate the definition of the ideal subject-worker as flexible, proactive and self-monitoring. Moreover, attention is dedicated to how content creators’ perceptions and alignment with the ideal subject-worker can shape their self-image and, consequently, impact their identities. For these reasons, it is crucial to investigate how content creators

²⁷ Angela McRobbie, *Be Creative: Making a Living in the New Culture Industries* (Wiley 2016).

²⁸ Duffy and Wissinger (n 26) 4653–4654.

²⁹ McRobbie (n 27).

³⁰ Gill (n 21).

³¹ See, e.g., Arturo Arriagada and Sophie Bishop, ‘Between Commerciality and Authenticity: The Imaginary of Social Media Influencers in the Platform Economy’ (2021) *Communication, Culture and Critique* 568.

³² Rosalind Gill and Andy Pratt, ‘In the Social Factory?: Immaterial Labour, Precariousness and Cultural Work’ (2008) 1, *Theory, Culture & Society*, 9.

define the contours of their professional trajectories, position themselves in relation to influencer work, and articulate their aspirations for the future to fully understand how all these elements shape their self-perception and identities.

3 THE RESEARCH: A QUALITATIVE INVESTIGATION OF CONTENT CREATORS' WORKING TRAJECTORIES

This chapter offers empirical insights from a broader mixed-method research conducted with Italian small content creators.³³ The analysis builds on data collected with qualitative in-depth interviews, a technique that allows the researcher to collect anecdotal and subjective perspectives on content creators' practices, as well as to grasp the reality in their own words.³⁴

Participants were recruited starting from a corpus of Instagram data, collected by querying the platform for all the posts labelled with the hashtag #influencer and geotagged in Italy, posted in February 2019. From there, a list of potential recruits complying with the following criteria was created: (1) users who posted regularly; (2) users involved in the display of sponsored content; (3) users with a following of between 10,000 and 100,000 followers, according to widely accepted definitions of micro-influencers. The sampling procedure aimed to privilege information-rich cases to account for relevant nuances of the phenomenon.³⁵ Participants were selected to maximise their diversity in terms of age, race, sexual orientation, and ability. However, despite sustained attempts, the sample is skewed towards white, cisgender and able women, mostly living in the north of Italy, thus reflecting the persistent "narrow culture" surrounding the influencer industry.³⁶ Instagram was chosen as the starting point of the research as it was, and still represents, a pivotal platform for content creators to develop their self-brands and entrepreneurial activities, offering the possibility to share both aesthetic visual content and more authentic and unpolished narrations through Instagram Stories.

In total, 25 interviews with Italian content creators aged between 18 and 35 were conducted, a number which aimed to achieve empirical saturation.

³³ For more information about the research see Bainotti (n 22).

³⁴ Michael Quinn Patton, *Qualitative Research and Evaluation Methods* (Sage 2014).

³⁵ Ibid.

³⁶ Brooke E Duffy and Emily Hund, 'Gendered Visibility on Social Media: Navigating Instagram's Authenticity Bind' (2021) *International Journal of Communication* 4983, 4988.

Among the themes addressed in the interviews, creators were asked to describe their everyday practices and the values orienting their promotional activities, as well as to provide insights into their professional trajectories, educational backgrounds and perceptions of work.

The analysis proceeded by highlighting the recurrent themes emerging from the data and pinpointing them with the analytical concepts described in the theoretical framework, in a grounded theory spirit.³⁷ To preserve the interviewees' privacy, the results are presented using pseudonyms.

With the presentation of findings, I identify three main categories of content creators, each associated with a specific constellation of activities and understanding of their roles and identity: (a) the full-time content creator; (b) the multitasker; and (c) the passionate second-shifter. In describing each category, particular attention is given to content creators' trajectories, career breaks and motivations guiding their behaviours. Furthermore, emphasis is put on how they articulate their identities against the more objective conditions of their occupational situation.

4 FINDINGS: THE COMPOSITE CAREERS OF SOCIAL MEDIA CONTENT CREATORS.

4.1 The Full-time Content Creator

First, the findings show a category of individuals who have transitioned from a "regular" job to working full-time and making a living from their influencer roles (n=5). Even though full-time content creators have not yet achieved the popularity of celebrities or the income of A-list influencers, with around 100,000 followers they have reached a stage where they effectively leverage their self-branding efforts and promotional activities to receive financial compensation.

An interesting aspect emerging from the interviewees is the constant negotiation of what it means to be a full-time content creator. As Giovanni states:

If you're just receiving perks or goods for free, then it's not a real job. If you have your expenses reimbursed, it's not a real job. The true marker of considering it a job is when you begin to get consistent financial income, basically when you can make a living from it (Giovanni, 31).

³⁷ Kathy Charmaz, 'Grounded Theory: Objectivist and Constructivist Methods' in Norman K. Denzin and Yvonna S. Lincoln (eds), *Handbook of Qualitative Research* (Sage 2000).

Most informants agree that to be considered a “real job”, the influencer work needs to be a full-time occupation that earns monetary compensation, rather than just securing free perks. The negotiation of what constitutes a real job also highlights content creators’ attempts at legitimising their role within the broader society, and, in turn, validating their own identities. Despite the long-standing affirmation of online content creation, there is still hesitancy among certain segments of the public to acknowledge it as a legitimate job, often resulting in the devaluation of this role.

Moreover, it is interesting to observe the diverse paths that have led individuals to embrace full-time content creation. Many creators in this category have made significant shifts, leaving behind their previous jobs or temporarily pausing their studies to fully immerse themselves in the influencer career. Driven by their passions, as well as the potential for financial reward, full-time content creators are able to transform accidental fame and entrepreneurship into a calculated and strategic career.³⁸ Sofia’s trajectory, from her background as an interior designer to her current role as a micro-influencer, is a clear example of this phenomenon:

So, fun fact: I actually studied interior design. After I graduated, I was set on being an interior designer forever. But then, around 25, I found myself spending entire days in the office, always with a lot of work to do and I realised: sure, I’m helping other people’s dreams come true, but what about my dreams? Meanwhile, I started this little blog on the side, just for fun [...] but then, it blew up and became one of the most popular in Italy back then. So then I thought, why not turn my blog into my job? (Sofia, 34).

This excerpt resonates with the neoliberal mantras of “be creative” and “do what you love”, which underpinned some of the interviewees’ decisions to leave a stable and remunerative job to pursue a creative, independent, and more fulfilling career as a content creator. Notably, the shift from accidental to calculated entrepreneurship is not framed as a blind leap into the unknown. On the contrary, the interviewees stress that it is a premeditated and planned decision, grounded in the various skills and capitals – be it economic, reputational,³⁹ or human – that they have already accrued over years of combining their roles as bloggers, vloggers or influencers with more traditional occupations. This is not to suggest that this decision lacked elements of risk and uncertainty, but to stress that it was a carefully considered choice made when the creators had

³⁸ Neff, Wissinger and Zukin (n 25).

³⁹ Alessandro Gandini, ‘Digital Work: Self-branding and Social Capital in the Freelance Knowledge Economy’ (2016) *Marketing Theory* 123.

a clear understanding of the potential for financial compensation and future prospects.

The context of precarity and uncertainty of the platformised influencer industry influences full-time content creators' career paths as well. These creators are not only involved in forms of cross-platform labour,⁴⁰ but also in other entrepreneurial endeavours aimed at differentiating their revenue streams. Rose, for instance, is a fashion content creator in her early 30s working towards the creation of her fashion brand. During the interview, she explained that she aims to "expand my business [...] and make sure that I create something that is just mine, that no one can take away from me". Interviewees also mentioned the need to expand their presence to other, more traditional media, such as television, as Christian explains:

For me, getting on TV would be a good opportunity. If you're killing it on social media, chances are you'd do well on TV too, which feels like a safer bet. Instagram's already seeing some rough times, so we're all kind of scoping out other options. There's TikTok, sure, but creating good TikTok content is hard, especially when you hit 30 and the regular TikTok user is half your age. Some of us are eyeing TV because at least we know it's a solid gig for a while longer. TV could mean doing live shows or even popping up on Netflix, not just trashy reality TV stuff [...] Basically, it's about ditching the phone screen and making it onto the big one (Christian, 30).

The excerpt shows that traditional media are considered more stable and less volatile than social media platforms like Instagram or TikTok, as well as a means to scale up and reach a wider audience. As a result, some of the creators interviewed are investing time and resources into securing quality TV appearances and acquiring new skills, for instance by attending acting classes. The commitment to self-improvement mirrors a broader trend within the neo-liberal labour market and the context of the creative industries, wherein staying updated and constantly acquiring new abilities is paramount.

The results showcase that the careers of full-time content creators are composite in that there is a clear effort to expand their entrepreneurial endeavours to other businesses and across a variety of media, including more traditional ones such as television. The sense of stability attributed to traditional media is particularly interesting, as it seems to overlook the equally precarious and competitive nature of this industry.⁴¹ Another recurring theme in the interviews is the ongoing quest for legitimisation of the content creator role as a real job, which significantly influences the identity of content creators.

⁴⁰ Glatt (n 6); Scaraboto and Fisher (n 13).

⁴¹ Cunningham and Craig (n 16).

4.2 The Multitasker

The second category of content creators comprises the so-called multitaskers – micro-influencers who truly embody second-jobbing⁴² and often combine more than two roles and activities in their composite careers. The multitaskers (n=8) usually work as freelancers in the cultural and creative industries, with job titles ranging from social media manager, communication expert, designer, and photographer, among others. In this sense, they can be associated with the project-based and entrepreneurial forms of employment called “portfolio-based careers”⁴³ which pervade the creative industries.⁴⁴ Among their various creative projects, the multitaskers are also involved in creating content online and collaborating with brands and companies to sponsor products, experiences and events.

The content creators in this category are multi-faced professional personae, characterised by a diverse array of competencies, skills, and credentials spanning across various fields. Although they do not engage in the influencer work full-time, they nevertheless cultivate substantial followings (ranging between approximately 30,000 and 50,000 followers) and manage to monetise their content to receive financial compensation. In these cases, their primary occupation in the creative industries is considered their first job, which the influencer work is complementary to. The synergy between these different roles is elucidated by Gabriele when he explains how he strategically navigates his multiple affiliations:

I consider myself somewhat of a hybrid figure – I’m an influencer, or content creator, whatever, but at the same time I’m a journalist and social media manager. That’s why I think I’m different from other content creators [...] Like, when I’m covering events as a journalist, I want people to acknowledge that’s my gig. I don’t want them thinking “Oh here’s the influencer”, because I’m a journalist too! (Gabriele, 30)

As the excerpt shows, various professional identities complement each other while also remaining distinct. Additionally, the role of content creator is strategically used depending on the context and when it represents a competitive advantage in front of potential clients and employers. The different activities and projects undertaken by the multitasker are complementary also in the sense

⁴² Gill (n 21).

⁴³ Neff, Wissinger and Zukin (n 25).

⁴⁴ Cunningham and Craig (n 16); Scolere (n 12).

that they propel each other. Jessica, a 25-year-old marketing and communication student, exemplifies this point clearly when she states:

So, I started out with Instagram, and then I decided to launch my website. That's when it hit me – my website could really have a future, whereas making money on Instagram alone would be much more difficult. I thought, "If I want to set myself up for success, I've got to focus on promoting my website using Instagram as a sort of storefront." That's what I did, I started using Instagram to drive traffic to my website, where I offer consulting meetings and workshops for sale (Jessica, 25).

Jessica illustrates that the strategic use of Instagram serves as a "shop window" to advertise various services and to nurture an audience of prospective clients. The interview highlights how content creators accrue reputational capital by creating content across multiple platforms and then redirecting and investing this resource into the constellation of jobs and activities they are involved in. Moreover, this example shows that the category of the multitasker also includes students and young professionals, who combine their educational careers with entrepreneurial endeavours.

For other creators in the category, instead, adding the production of digital content to their creative projects is described as almost a necessity. Lorna and Elia, for instance, are professional photographers who use Instagram to showcase their photos and projects, aiming to attract an audience of new clients as well as secure deals with brands, companies, or travel agencies. During the interview, Lorna expresses her aversion towards the Instagram platform and its logic, which she is nevertheless "forced" to follow:

I'm not into considering myself an influencer, or even a content creator... I mean, I'm a photographer! But sadly, if you want to work, you have to play by the market's rules. I don't like putting in all that effort to get likes, game the algorithm, or stressing over Instagram... but for now, I need to be present on Instagram and sponsoring some products every now and then, maybe push a yoghurt or something that I'd eat anyway... (Lorna, 29).

For some interviewees, being a content creator and using social media platforms such as Instagram are purely instrumental means to perform their creative careers. These creators complain about and take distance from the interconnected nature of their activities and portfolios,⁴⁵ which are ever more dependent on the logic of social media platforms and the economies of visibility they promote. Nevertheless, a certain adherence to social media affordances and functioning is necessary to counter more structural issues of

⁴⁵ Scolere (n 12).

precarity and low pay associated with the creative industries and worsened by the platformisation of cultural production.⁴⁶

The category of “multi-taskers” illustrates how content creators’ composite careers comprise a vast array of jobs, roles, and creative projects, with online content creation being just one component. Furthermore, the analysis offers insights into how content creators perceive the different activities they are involved in and navigate their “composite identities”. On the one hand, multi-taskers acknowledge and embrace their multi-faced personae by strategically negotiating their various affiliations and dimensions of their jobs, while taking advantage of the benefits they offer in different situations. On the other hand, for some, being an influencer is seen as a necessity, with significant drawbacks that they would prefer to avoid.

4.3 The Passionate Second-Shifter

The last category emerging from the analysis comprises content creators called “passionate second-shifters” and includes the majority of creators interviewed (n=12). The category name stems from the dual nature of these content creators’ activities: first, the combination of a conventional job with influencer work, which they often describe as a “second shift”, and second, the dimension of passion that guides their pursuits.

For these micro-influencers, creating digital content serves as a secondary job and a side activity, one that plays an integrative role in their occupational trajectories. Influencer work is typically balanced alongside either a full-time, more standard, occupation in the labour market, or the full-time commitment to education. Differently from the category of the multi-tasker, these content creators hold multiple jobs unrelated to the cultural and creative industries, such as nursing, secretarial roles, or studying law. Furthermore, they do not use their social media accounts for self-branding purposes, or accruing reputational capital, as observed in the previous category, nor do they showcase their everyday professional lives on their accounts. Despite influencer cultures creeping into other labour markets and reconfiguring workers’ activities more broadly,⁴⁷ and the increasing trendiness of sharing work-related activities online (especially on TikTok), the passionate second-shifters use social media platforms to talk about their hobbies and passions, which relate to the fields of beauty, fashion and travel. For these creators, influencer work serves as an additional revenue stream (often in the form of consumer goods and perks) that

⁴⁶ Poell et al. (n 2).

⁴⁷ Sophie Bishop, ‘Influencer Creep: How Artists Strategically Navigate the Platformisation of Art Worlds’ (2023) *New Media & Society*.

integrates their main occupation and, above all, offers a sense of self-fulfilment and prestige.

The narratives embraced by the content creator as the second-shifter are imbued with the dimension of passion. For them, the production of content online is akin to a hobby and leisure activity, providing an escape from their primary jobs and adding extra value to their lives overall. Similar to full-time content creators, they too describe their visibility as the result of accidental fame and uncalculated practices, at least at the beginning of their activities. However, they also describe the effort they put into the work of influencing, dedicating their off-hours or weekends to the production of content and the managing of their profiles. Therefore, what is perceived and described as a passion and a hobby ultimately translates into an unpaid “double shift”, which transforms leisure time into a productive activity and adds value, meaning and status to their lives. As Alice, a part-time secretary who works as a content creator in her free time, states:

I received some quality beauty products, which was a real benefit for me. To be honest, I can't afford to splurge on beauty products. I always opt for more budget-friendly options because my income doesn't allow me to spend 50 euros on a face cream. So, when I receive products for free, I'm genuinely happy to try them out because they are usually expensive! Other than that, Instagram doesn't exactly pay the bills! I only just recently made some cash from partnering with a brand, which was a new experience for me. But all I could afford was to treat myself to something nice (Alice, 35).

As evident from this excerpt, being a content creator is considered as a means to bypass unsatisfactory employment and earn a living without giving up on one's true passions. Additionally, it serves to enhance one's financial situation by supplementing a primary income with occasional additional earnings (even though these are quite rare) and by receiving free consumer goods. Nevertheless, as existing literature has highlighted, the emphasis on passion and visibility masks the persistence of structural inequalities, such as issues of unfair compensation.⁴⁸

Some of the content creators interviewed aspire to transform their influencers' activities into a more stable and full-time job, thus showing some resemblance to aspirational labourers.⁴⁹ Others, instead, do not necessarily aspire to reinvest the accrued visibility into a career in the creative industries or abandon their 9–5 jobs altogether. On the contrary, they are inclined to maintain their

⁴⁸ Duffy (n 5).

⁴⁹ Ibid.

primary jobs or aspire to more conventional ones, which are perceived as more stable and less prone to fluctuations and insecurity. As Manuel states:

I wanna do something that's lively and exciting... Instagram's just a hobby for me; it's there, maybe if I hit 30 and find myself jobless, I'll think about being a content creator again, assuming Instagram's still around. Besides that, I aim to pursue a career related to my degree. I wouldn't mind working in political communication, that's my goal (Manuel, 25).

Notably, the passionate second-shifter category also includes creators whose primary occupation is as students at the time of the research, enrolled in diverse courses such as political science, medicine, and law. They consider working as an influencer an integrative activity to their education, in between a hobby and a gig. However, they also regard their involvement in this activity as temporary. Interestingly, in these cases, influencer labour is conceived as a transient activity, whereas greater importance is placed on formal education and efforts directed towards securing a conventional job.

As existing research suggests, creative workers often engage in non-creative jobs to generate income and support their creative practice.⁵⁰ Similarly, the composite career of the passionate second-shifter combines the labour of content creation, which offers status but no monetary compensation, and their other jobs, which may carry lower prestige but provide a higher and more stable income.

5 CONCLUSION

This research sheds light on yet another layer of the nested precarities of visibility faced by platformised cultural workers to pursue their careers. In addition to adapting their practices to a variety of platforms, content creators, and especially micro-influencers with small to medium followings, spread their efforts across multiple jobs and activities to navigate both the instability of the labour market and the ever-evolving nature of digital platforms.

The results showcase that small content creators respond to these challenges by engaging in composite careers, characterised by the combination of diverse activities, roles, or jobs across multiple fields or sectors. Significantly, none of the micro-influencers interviewed engage in just one activity; even those who consider themselves full-time content creators diversify their endeavours to expand their businesses. The work trajectories and identities of the small content creators in this research build on the combination of multiple entrepreneurial endeavours and the acquisition of new skills to thrive in their

⁵⁰ McRobbie (n 20).

influencer work, as seen with the full-time content creators, or to support other activities within the cultural and creative industries, as exemplified by the multitaskers category. For others, juggling multiple jobs is a means to generate extra income, albeit rooted in consumption, and enhance their quality of life and self-expression.

The results further confirm the intricate nature of content creators' work biographies, which diverge significantly from the traditional notion of "career" and the expectations of linear development and progression of hierarchy.⁵¹ Content creators' trajectories can also be viewed as *intermittent careers*. First, despite their relatively young age, many interviewees had already experienced one or more career breaks, whether through job changes, educational adjustments, or reconfiguring their activities to integrate influencer work. Second, there was shared acknowledgement of the temporary nature of being a content creator, with an understanding that this activity may not last indefinitely or may represent just a phase in their professional journeys. For most participants, including some full-time content creators, influencer work is perceived as temporary and as a means to gain reputational capital, improve one's skills, and derive both financial and personal benefits. Such an understanding of influencer work also helps explain the choice of alternating phases of active engagement with latent moments, reported by multitaskers and passionate second-shifters. These categories of content creators allocate time and effort to influencer work based on the demands of their other activities and engagements.

Furthermore, the interviews underscore that content creators navigate the uncertainties of the influencer industry also by thinking about possible alternatives for the future and elaborating a "plan B". These alternatives often build on content creators' investments in education as well as on the new skill sets and experience they can acquire while performing the influencer work. For some, having a degree or a job in a completely different sector serves as a source of reassurance, providing them with the flexibility to pivot and transition to what is considered a more standard occupation, if needed. Interestingly, then, the role of formal education is not disregarded; rather, it is viewed as an important investment in their future careers, whatever path they might take, and serves as a valuable resource in times of flexibility and precarity. Furthermore, the skills and reputation acquired while working as content creators, such as managing social media profiles, creating sponsored content and understanding the functioning of algorithms, are deemed advantageous assets in other contexts, if their careers as micro-influencers do not progress. Therefore, another element characterising content creators' composite careers is the *transposability of competencies*. Micro-influencers embody a flexible mindset and believe that

⁵¹ Gill (n 21).

the competencies and experiences gained while engaging in influencer work are transferable across various phases of life and adaptable to diverse contexts and situations.

The composite and intermittent nature of content creators' work trajectories, as well as the transposability of their competencies, all contribute to forming a polyhedric identity. Such identity is shaped through negotiation with their multiple affiliations, each offering its own set of advantages and disadvantages. For some, the work of an influencer represents a badge of status and a valuable anchor for their identity. For others, instead, it represents a necessary endeavour to fuel their activities and serves as a storefront for visibility in a saturated influencer industry and in the broader context of the platformisation of cultural production. Ultimately, the importance assumed by composite careers among small content creators aligns with the characteristics of neoliberal subject workers, and further amplifies the relevance of qualities such as flexibility, entrepreneurship and self-monitoring.

Given the complexities of the platformised influencer industry, it is inevitable that some content creators may struggle to thrive and, consequently, some of them may ultimately choose to exit the influencer industry altogether. Future research could shed light on the fluctuations in small content creators' careers and explore the trajectories of those who leave the creator economy. Despite the difficulties, such research would be crucial, given that success stories usually dominate the narrative, while instances of what most would consider a failure tend to be overlooked or forgotten.

4. The shelf lives of *wanghong*: Surviving scandals for internet fame in China

Sijun Shen and Crystal Abidin

1 INTRODUCTION

In this chapter, we consider the backdrop of *wanghong* governance in the Chinese market to situate two case studies of *wanghong* who were embroiled in prolific scandals. In the category of political scandals, we consider the *wanghong* Qiao Bi Luo Dian Xia (乔碧萝殿下) and Xin Ba (辛巴), who were involved in faking selfie images and selling fake products, thus violating China's recent regulatory focus on livestreaming product qualities. While Qiao Bi Luo Dian Xia eventually was forced to retire from the industry, Xin Ba sustained censorship and legal issues but continued to thrive and successfully monetise their content. In the category of financial scandals, we focus on Yang Chengang (杨臣刚) and Li Ziqi (李子柒), who faced very public disputes with their *wanghong* agencies. While Yang Chengang was quickly 'forsaken' (抛弃; *pāoqì*) by the public, Li Ziqi utilised the very crisis and leveraged state regulations to transnational fame. Through the construction of ethnographically informed case studies, this chapter draws on online posts, fan discussions, media discourse, and official statements surrounding four *wanghong* to interrogate the implications of these manoeuvres. Collectively, the case studies touch on issues of regulation and governance pertaining to the Chinese government ministries (e.g. China's Performing Industry Internet Performance (livestreaming) branch, the Bureau for Market Monitoring and Regulating) and a variety of platforms (e.g. DouYu, KuaiShou, MeiPai, XiaMi, WeiBo, and YouTube). We also consider the 'softer' and more 'informal' modes of regulation, such as 'judgement by public opinion' (公众判断; *gōngzhòng pànduàn*) in considering how the gendered profiles of the various *wanghong* may have impacted public perception of their scandals and return. These case studies highlight the strategies and labour of *wanghong* in their attempts to

survive scandals and leverage crises as opportunities within China's precarious digital economy.

2 SUSTAINING WORK THROUGH SCANDALS

Scandals are a double-edged sword for internet celebrities who can intentionally utilise their attention-attracting potential as an opportunity to enhance their online visibility and, at times, be negatively impacted.¹ Regarding utilising scandals as an opportunity, digital ethnographer Crystal Abidin observes that influencers would adopt transgressions and risky strategies, such as lying, faux pas and shaming, in order to get ahead in their pursuit of attention.² More often than not, stirring up drama and scandals of other microcelebrities, especially of the better-known ones, is a strategy used by low-level microcelebrities to boost their own online visibility.³ The group of influencers who adopt similar strategies are known as 'controversy-seeking' influencers who commodify 'their privacy to chase drama and controversy, garner negative attention for themselves or others, display authenticity claims, engage in Influencer wars, and play with ideas around productive disorder'.⁴

On other occasions, however, online scandals may lead to or coincide with cyberbullying and hate comments.⁵ In these cases, the strategies influencers adopt are crucial to sustaining their work through scandals. Media studies scholar Caitlin E Lawson summarises two often-adopted strategies: (1) 'explaining, apologizing, and reframing'; and (2) remaining silent to

¹ Crystal Abidin, 'Sorry Not Sorry: Influencers, Shamelebrity, and Para-Apologetic Transgressions' (2016) AoIR Selected Papers of Internet Research; Jin Lee and Crystal Abidin, 'Backdoor advertising scandals, Yingyeo culture, and cancel culture among YouTube Influencers in South Korea' (2021) *New Media & Society*.

² Abidin (n 1) at 6.

³ Ibid; Crystal Abidin, 'L8r H8r: Commoditized Privacy, Influencer Wars, and Productive Disorder in the Influencer Industry' in Rebecca Anne Lind (ed), *Producing Theory in a Digital World 3.0* (Peter Lang 2020); Femke Geusens, Gaëlle Ouvrein and Soetkin Remen, '#Cancelled: A qualitative content analysis of cancel culture in the YouTube beauty community' (2023) *The Social Science Journal* 1.

⁴ Abidin (n 3) at 32.

⁵ Crystal Abidin, 'Victim, Rival, Bully: Influencers' Narrative Cultures Around Cyberbullying', in Heidi Vandebosch and Lelia Green (eds), *Narratives in Research and Interventions on Cyberbullying among Young People* (Springer 2019).

minimise negative impacts.⁶ In a similar light, Abidin summarises a group of Singaporean influencers' strategies in response to cyberbullying: (1) remaining silent; (2) publicly shaming the bullies; (3) giving clarifications after the peak of the scandal; and (4) legal solutions.⁷ Specifically, some commonly adopted strategies in addressing scandals and dramas include trying to be transparent and candid and producing 'apology videos' that feature influencers themselves who apologise for their deeds.⁸ However, apology videos often become the objects of criticism.⁹ Indeed, according to Abidin,¹⁰ apology videos produced by influencers are not used simply to apologise but to attract and maintain attention from loyal followers, disappointed followers, press and the curious public alike.

To date, the discussions around the labour to sustain work through scandals predominantly focus on countries with prominent capitalistic economic-political systems and online cultures conditioned by such systems. The strategies for sustaining work and income in the Chinese context share some traits with what was discussed in this research but are marked by their specific regulatory contexts. The following sections thus first introduce the concept of *wanghong* and then discuss its governance in China.

2.1 What (or Who) is *Wanghong*?

Wanghong, literally translated as 'internet red', refers to the technological-driven celebrification of the ordinary on the internet.¹¹ It can be considered a popular Chinese phrase that roughly approximates to 'internet celebrity', 'influencer', and 'microcelebrity'.¹² Emerging around 2015, this phrase is an abbreviation of *wǎnglùó hónggrén* (meaning 'internet red people'; hereafter *wanghong*).

⁶ Caitlin E Lawson, 'Skin deep: Callout strategies, influencers, and racism in the online beauty community' (2021) 23(3) *New Media & Society* 596, 605–608.

⁷ Abidin (n 5).

⁸ Lee and Abidin (n 1); Rebecca Lewis and Angèle Christin, 'Platform drama: "Cancel culture," celebrity, and the struggle for accountability on YouTube' (2022) 24(7) *New Media & Society* 1632, 1650.

⁹ Lewis and Christin (n 8).

¹⁰ Crystal Abidin, 'Sex Bait: Sex Talk on Commercial Blogs as Informal Sexuality Education' in Louisa Allen & Mary Lou Rasmussen (eds), *The Palgrave Handbook of Sexuality Education* (Palgrave Macmillan 2017).

¹¹ Jian Xu and Xinyu Zhao, 'Changing Platformivity of China's female Wanghong: From Anni Baobei to Zhang Dayi' in Shenshen Cai (ed), *Female Celebrities in Contemporary Chinese Society* (Springer 2019).

¹² Crystal Abidin et al., 'Influencers and COVID-19: Reviewing key issues in press coverage across Australia, China, Japan, and South Korea' (2021) 178(1) *Media International Australia* 114.

Like the Western context, under the glamorous and get-paid-for-enjoying facade, online celebrification requires a tremendous amount of labour.¹³ Similar to the visibility labour of influencers,¹⁴ *wanghong* also engage in various online activities to disseminate their online content and motivate their followers to interact with them and share their content. *Wanghong*'s visibility labour is not simply a matter of quantity but requires skills and understanding of the platform and the followers. In this regard, *wanghong* share content according to the 'platform time', i.e. when the platform promotes particular genre(s) of content, and they imitate top trends to enhance their ability to attract viewers' attention and algorithmic popularity.¹⁵

Regarding their persona, or performed identities, *wanghong* are caught between the demands of the platforms, agencies, endorsers and audiences, and they adopt multiple layers of identities as 'self-presenters, self-branders, and community members' to make sense of their works within this space.¹⁶ To attract viewers and maintain their relationships with followers, *wanghong* simultaneously portray themselves as celebrities who are glamorously living an aspirational lifestyle and ordinary people who are engaging, cheerful and fun.¹⁷ China's rural *wanghong*, in particular, intentionally perform a sense of 'ruralness', sometimes in the form of 'vulgarness', as these fit the expectations and stereotypes of what a rural Chinese person would look like and how they would behave.¹⁸

¹³ Crystal Abidin, "'Cya IRL": Researching digital communities online and offline' (2014) 18(2) (Palgrave Macmillan 2014); Erin Brooke Duffy, 'Mythologies of creative work in the social media age: Fun, free, and "Just Being Me."' (2017)

¹⁴ Crystal Abidin, 'Visibility labour: Engaging with Influencers' fashion brands and #OOTD advertorial campaigns on Instagram' (2016) 161(1) Media International Australia 86.

¹⁵ Anthony Fung et al., 'If I'm not streaming, I'm not earning: audience relations and platform time on Douyin' (2022) 1(2)

¹⁶ Xiaoxian Wang, 'Practice, identity, and tactic: Young Chinese vloggers' interactions with the social media platform Bilibili' (2023) 22 Asian Anthropology 213, 214.

¹⁷ Yilei Wang and Dezheng Feng, 'Identity performance and self-branding in social commerce: A multimodal content analysis of Chinese wanghong women's video-sharing practice on TikTok' (2022) 50 Discourse, Context & Media 1.

¹⁸ Shichang Duan, Jian Lin and Jose van Dijk, 'Producing new farmers in Chinese rural live e-commerce: Platformization, labor, and live e-commerce sellers in Huaiyang' (2023) 16 Chinese Journal of Communication 250.

2.2 Multidimensional *Wanghong* Governance

In China, *wanghong* governance is multidimensional, involving self-regulation by users, agencies, and platforms.¹⁹ Three roles are particularly important to *wanghong*'s self-regulation: (1) digital platforms; (2) *fāngguǎn* (房管, hereafter *fangguan*; literal translation 'room manager'); and (3) *gōnghuì* (公会, hereafter *gonghui*; literal translation 'workers association').

Since 2016, digital platforms have been mandated to form their own censorship system to monitor and manage *wanghong*, ensuring their conduct meets the centralised regulatory requirements.²⁰ Digital platforms manage *wanghong* through self-disciplinary agreements, utilising digital tools such as in-built algorithmic monitoring and detection mechanisms, and implementation of disciplinary measures such as fines and temporary or permanent bans.²¹

Another key component of the platforms' censorship system is *fangguan*, which is a 'special group of moderators... [who] regulate viewers' speech during live-streaming', and which is the most significant body of 'on-the-ground' monitoring and moderating personnel who perform the (self-) regulation responsibilities for the platforms.²² *Fangguan* is one of the most indispensable stakeholders on the frontline of the *wanghong* industry who monitor the *wanghong*'s online conduct and detect questionable behaviours.²³

However, *fangguan* serves its function after the content is uploaded or the livestreaming has commenced. In comparison, the *gonghui*, or *wanghong* agency, manages the entire chain of the *wanghong*'s work, including organising resources, production, dissemination, and consumption. *Gonghui* is a profit-driven guild that mediates between the *wanghong* and the platforms,

¹⁹ Yuanbo Qiu and Timothy Dwyer, 'Regulating Zhibo in China: Exploring multiple levels of self-regulation and stakeholder dynamics' (2022) 15 Policy & Internet 266.

²⁰ Yuanbo Qiu, 'The Political Economy of Live Streaming in China: Exploring Stakeholder Interactions and Platform Regulation' (PhD thesis, University of Sydney 2021).

²¹ Junfeng Wang, 'Research on the development of live streaming industry in China' (2018) 65 Proceedings of the 2018 International Conference on Economics, Business, Management and Corporate Social Responsibility 155.

²² Fan Xiao, 'Moderating for a friend of mine: Content moderation as affective reproduction in Chinese live-streaming' (2023) 46 Media, Culture & Society 60.

²³ Cai Cuihong and Dai Liting, 'Evolution of internet governance in China: Actors and paradigms' (2021) 7 China Quarterly of International Strategic Studies 79; Qui and Dwyer (n 19).

and they recruit *wanghong* with the promise of mentorship and training, helping them design their persona and better understand algorithms.²⁴

2.3 Centralised *Wanghong* Governance

In China, multidimensional governance follows a centralised approach in serving the economic and political needs of the nation.²⁵ This centralised approach is ensured by the authorities of multiple central government regulators and state-sanctioned industry associations that regulate *wanghong*, *wanghong* cultures and industry activities. These authorities manage *wanghong* through disciplinary and administrative campaigns and censorship. This centralised approach ensures the *wanghong* industry satisfies the state's dual demands of economic development and socialist cultural legacy.

Central government regulators, which encompass a myriad of state bureaus, initiate annual campaigns to manage *wanghong* cultures. In July 2015, the Ministry of Culture of the People's Republic of China investigated and prosecuted 26 major online livestreaming platforms.²⁶ In 2016, the National Copyright Administration, the Ministry of Industry and Information Technology, the Ministry of Public Security, and the Cyberspace Administration of China joined forces to initiate the Sword-Internet (剑网), which is an annual 'cleansing the internet' campaign, and investigated and prosecuted 514 administrative suits and shut down 290 platforms.²⁷ In 2017, China's Anti-pornography Office initiated the 'Clean Internet' (净网) campaign targeting digital platforms and mobile apps.²⁸

²⁴ Tingting Liu, Chris K. K. Tan, Xiaobing Yang and Miao Li, 'Zhibo gonghui: China's 'live-streaming guilds' of manipulation experts' (2023) 26 Information, Communication & Society 1210.

²⁵ Jian Xu, Lina Qu and Ge Zhang, 'Governing social eating (chibo) influencers: Policies, approach and politics of influencer governance in China' (2022) 14 Internet & Policy 525.

²⁶ Wang Zhifu, '文化部查处斗鱼等26个直播平台 北京试行主播"黑名单"' (NBD, 13 July 2016) <<http://www.nbd.com.cn/articles/2016-07-13/1021476.html>> accessed 23 June 2024.

²⁷ Xinhua News Agency, "'剑网2016"专项行动查处行政案件514件 关闭网站290家' (China Government, 22 December 2016) <http://www.gov.cn/xinwen/2016-12/22/content_5151609.htm> accessed 23 June 2024.

²⁸ Shi Jingnan, '全国"扫黄打非"办公室部署开展"净网2017""护苗2017""秋风2017"专项行动' (The State Council The People's Republic of China, 22 March 2017) <https://www.gov.cn/xinwen/2017-03/22/content_5179705.htm> accessed 23 June 2024.

The industry association, the China Association of Performing Arts (CAPA) Online Performance (Livestreaming) Branch, is a state-sanctioned administrative regulator rather than an autonomous industry organisation. The most significant regulatory action initiated by CAPA is the ‘Online Performance (Livestreaming) Streamer Blacklist Administration System’ (网络表演(直播)行业主播“黑名单”管理制度), which has issued ten blacklists between 2018 and 2022, banning 498 *wanghong* from livestreaming.²⁹ Although China’s internet governance is transiting from centralised one-way management to involving multiple levels of stakeholders, these top-down initiatives and campaigns are the main drivers and guidelines of the industry stakeholders’ self-regulation, ensuring industry stakeholders’ compliance.³⁰

These disciplinary regulators ensure that while the *wanghong* economy boosts China’s economic development, following the guiding principles stated in China’s recent national strategic policies, it also serves China’s socialist cultural legacy. As stressed in China’s Thirteenth Five-Year Plan³¹ – China’s national strategic plans issued twice a decade that principally guide its economic development – China aims to reach its potential by accelerating the building of a digital China and enriching the integration between information technology and economic development.

More importantly, the *wanghong* industry must also fulfil (socialist) cultural responsibilities. China stresses the development of the cultural industry and raises it as a critical theme of national developmental plans to develop a socialist culture that promotes the country’s soft power.³² In this sense, China’s tol-

²⁹ People’s Daily Online. ‘中国演出行业协会网络表演(直播)分会发布第九批警示名单 吴亦凡、郑爽、张哲瀚等88人被封禁_治理监督_网络安全_河南网信网’ (*People’s Daily Online*, 23 November 2021) <<https://www.hnwxw.net/mobile/Article/7496.html>> accessed 23 June 2024; China Performance Industry Association. ‘第十批网络表演(直播)行业主播警示名单发布’ (*CPI*, 14 December 2022) <http://mp.weixin.qq.com/s?_biz=MzA5MjM3MDk3Ng==&mid=2650144785&idx=1&sn=be49598e4c0435de5db6cc8a032500e9&chksm=886c815ebf1b0848743aae4afa1c8b347734ef02c90c00ce87f1700db0c05ee73e98e24a81c6#rd> accessed 23 June 2024.

³⁰ Fan Dong, ‘Controlling the internet in China: The real story’ (2012) 18 *Convergence* 403.

³¹ Xinhua News Agency, ‘中华人民共和国国民经济和社会发展第十三个五年规划纲要_滚动新闻_中国政府网’ (*China Government*, 17 March 2016) <https://www.gov.cn/xinwen/2016-03/17/content_5054992.htm> accessed 23 June 2024.

³² Ministry of Culture of the People’s Republic of China. ‘Quadrennial Periodic Report on Measures to Protect and Promote the Diversity of Cultural Expressions People’s Republic of China’ (*China Government*, 1 January 2013). <<https://en>

erance and even encouragement of online cultures and economy coincide with the country's opening up of its economy to the international market, but – more crucially – it is based on a governance approach that ensures the internet can be controlled and tamed to serve the Party-State's political interests.³³

This centralised approach and its guiding principles have conditioned *wanghong* work and labour that are unique to the Chinese. First of all, *wanghong* have to negotiate and manage the ever-changing governance strategies, regulatory moves and censorship regimes on top of platforms' and agencies' exploitative business agendas.³⁴ More specifically, they need to adapt their performances according to China's political agenda and socialist cultural demands. As such, moving away from strictly censored topics is one of the crucial strategies adopted by *wanghong*.³⁵ This regulatory context raises the question of how *wanghong* labour and strategies in relation to sustaining work through scandals might be unique to the Chinese context.

3 METHODOLOGY

This chapter focuses on four *wanghong* to understand how they navigate and even leverage scandals within the governance context in the Chinese market, particularly in terms of their strategies and persona-building efforts. The selection of the case studies is informed by the authors' digital ethnography of the *wanghong* industry since 2017. During this time, the authors have gained knowledge of the overall ecology of the *wanghong* industry, the functionalities of relevant digital platforms and China's *wanghong* governance. Although the authors have not interviewed these four *wanghong*, their conversations with and observations of other *wanghong* provide invaluable insight into the case selection and background context of this research. The data collected in this study are guided by two research questions:

1. What strategies do *wanghong* employ to survive scandals and leverage crises?
2. How is their labour unique to the Chinese context?

.unesco.org/creativity/governance/periodic-reports/2013/china> accessed 23 June 2024.

³³ Assafa Endeshaw, 'Internet regulation in China: the never-ending cat and mouse game' (2004) 13 Information & Communications Technology Law 41.

³⁴ Jian Lin, *Chinese Creator Economies: Labor and bilateral creative workers* (New York University Press 2023).

³⁵ Sijun Shen, 'Commercialising potential as a critical factor of differential media management: A cultural zoning study of China's regulation of mukbang and online eating disorder communities' (2023) 45 Media, Culture & Society 373.

To answer these questions, this chapter draws on online posts, fan discussions, media discourse, and official statements around these *wanghongs* and their scandals. The data collected for the analysis of each case vary since their work and online scandal have distinctive duration and context, and involve different platforms.

Qiao Bi Luo Dian Xia was a livestreamer on DouYu, but her account was deleted after a scandal in August 2019. To understand the official discourse around this scandal, we collected the public announcement issued by the DouYu platform and the regulatory document issued by CAPA. To understand the public perception of this scandals, we collected memes and video adaptations on BiliBili and discussions on Baidu Tieba and Zhihu, China's two biggest online forums. Although Qiao Bi Luo Dian Xia never managed to achieve the same level of fame, she continued to produce internet music and tried to sustain her fame on Weibo, Twitch, and YouTube. We have thus collected all of her publicly accessible posts on these three platforms in order to understand her strategies and labour in attempting to return.

Compared with Qiao Bi Luo Dian Xia, who was pushed out of the industry after a scandal, Xin Ba was banned by Kuaishou and has been sued by the Bureau for Market Monitoring and Regulating multiple times since 2019. To understand how he repeatedly returned, we studied online media discourse around his persona and business (Xin Xuan Group) via a web search on Baidu and posts on his Kuaishou and Weibo official accounts. Through this preliminary search, we compiled a list of bans against Xin Ba, including information on the duration, reasons, and other penalties. Based on this list, we focused on his posts and activities, especially during his ban, to understand his strategies and labour to manage these scandals. To understand the public perception of his scandal, we drew on the comments left on his social media and livestreaming posts and discussion threads on Baidu Tieba and Zhihu.

Like Xin Ba, Li Ziqi has leveraged her disputes with her agency to return as an international celebrity. To focus on her persona construction, we collected data through her interviews, profiles, videos, and text posts on BiliBili, YouTube, Douyin, and Weibo. To gauge the public perceptions of her scandal and return, we collected comments on her posts and media discourse on her scandal and return. This media includes CCP mouthpiece *Xinhua.net*, *People.com*, *Global Times*, and mainstream entertainment media outlets such as *Sohu*, *Sina*, *Tencent*, and *Toutiao*.

Compared with the other *wanghong*, Yang Chengang's fame and retreat were before the prevalence of livestreaming platforms. In order to gather data on his fame, we conducted a Baidu search of online discussions and media discourse around him using the search term '杨臣刚' (Yang Chengang) and his infamous single '老鼠爱大米' (*lǎoshǔ ài dàimǐ*, literal trans. 'mouse loves rice'). Over the years, Yang Chengang made many attempts to return to his

former level of fame, including through livestreaming. We collected his profiles, videos, and text posts on Douyin, Kuaishou, and Weibo to study his strategies and labour in attempting to return. We also collected the comments left in correspondence to his posts to understand the public perceptions of him.

The collected data was analysed using qualitative inductive content analysis³⁶ (where researchers analyse the corpus without predefined codes and derive different categories from the texts). Inductive content analysis is done through several rounds of coding to merge categories until the point of saturation is reached, i.e. the categories can no longer be merged with each other.³⁷ Following this approach, we identified two general categories of *wanghong* labour and strategies. The first category refers to labour that directly aims at sustaining visibility and income, including subcategories of lying, explaining, apologising, shaming, reframing and controversy-seeking. These strategies largely coincide with what Abidin³⁸ and Lawson³⁹ identified in their research. The second category focuses on the labour involved in politicising one's personas, which includes subcategories of identifying as rural origin promoters, and contributors, supporters and ambassadors of rural economy and population and Chinese traditional culture. These strategies are relatively unique to the Chinese context. This focus on building a persona of 'ruralness' is different from the form of the performances of 'vulgarness' as pointed out by Duan Lin and van Dijck⁴⁰ (2023), by moving away from constructing an identity as a commercialised businessperson to an active contributor to China's political agenda and socialist cultural demands.

4 STRATEGIES OF SELF-PROMOTION AND THEIR UNFAVOURABLE OUTCOMES IN CHINA

4.1 Qiao Bi Luo Dian Xia

One of the most well-known cases of a *wanghong* who faded from peak fame due to a scandal is Qiao Bi Luo Dian Xia. The scandal involved her 'true face' being shown due to a platform glitch. On 23 July 2019, Qiao Bi Luo Dian Xia, a gaming streamer on DouYu who claimed to be young and pretty, accidentally

³⁶ Margrit Schreier, 'Content Analysis, Qualitative' in Paul Atkinson, Sara Delamont, Alexandru Cernat, Joseph W Sakshaug and Richard A Williams (eds), *Research Methods Foundations* (Sage 2019).

³⁷ Ibid.

³⁸ Abidin (n 5).

³⁹ Lawson (n 6).

⁴⁰ Duan, Lin and van Dijck (n 18).

conducted a livestream without her ‘virtual mask’ – a cartoon image often used by *wanghong* to cover their faces when they are not wearing makeup and filters. The viewers and fans considered her face without makeup and filter unattractive, making comments such as ‘middle-aged’, ‘worn-out’, and ‘repulsive’ and criticising her across online media outlets. Consequently, she became the number one most searched *wanghong* on DouYu and Zhi Hu (one of the most popular online discussion forums in China) and within two days, she had attracted 600,000 new followers.⁴¹

Immediately after the incident, one of the first actions that Qiao Bi Luo Dian Xia took was to post filtered images of herself online. This strategy is a combination of (continuously) lying⁴² and reframing⁴³ with the hope of reversing people’s perceptions of her. However, the comments on her Weibo were rampant with condemnations and rage. In response, she shifted to utilise a strategy that combined lying and publicly shaming the hate commenters. In one of her Weibo posts, she jokingly asked the question below:

I don’t know why society is so hostile towards a 58-year-old elder. All of the videos were just to entertain people. Why did people have to be so vile after being entertained?! (Qiao Bi Luo Dian Xia, 2019)

Around the same time, she generated more drama and escalated the scandal by stating on Weibo and while livestreaming that she spent 280,000 yuan (approx. AUD 59,600) to stage the incident intentionally to attract followers.

Eight days after her infamous incident, she was banned permanently by the platform DouYu. The reasons the platform gave were self-promotion, inappropriate speech, challenging the bottom line of the general public, and unsatisfactory social influence.⁴⁴ She was then blacklisted and banned from livestreaming by CAPA. CAPA rationalised their action under the suspicion that Qiao Bi Luo Dian Xia was conducting illegal activity; destroying good public order; disseminating vulgar information; and conducting malicious self-promotion.⁴⁵ As the online media outlets proposed, the malicious

⁴¹ Damei ‘斗鱼女主播’乔碧萝殿下”事件到底是咋回事?_直播’ (Sohu, 1 August 2019) <https://www.sohu.com/a/330832366_100097866> accessed 23 June 2024.

⁴² Lawson (n 6).

⁴³ Abidin (n 5).

⁴⁴ Sun Wenhao. ‘快看|斗鱼确认”萝莉变大妈”事件系主播自主策划,已永久封停|界面新闻·科技’ (Jiemian, 1 August 2019) <<https://www.jiemian.com/article/3363509.html>> accessed 23 June 2024.

⁴⁵ China Youth Network. ‘第三批主播黑名单发布’乔碧萝”等59人被封禁五年-今日头条’ (Toutiao, 8 August 2019) <<https://www.toutiao.com/article/6722582299747025419/>> accessed 23 June 2024.

self-promotion points to her ‘admission’ of being a 58-year-old who pretended to be a young, attractive *wanghong*, and that she had intentionally staged the event.⁴⁶

In later interviews, Qiao Bi Luo Dian Xia clarified that she was a millennial, and calling herself 58-year-old was just her attempt to lighten the mood and also engage with some of the comments that refer to her as middle-aged. She also denied having staged the incident as she had claimed previously, explaining the statements as her attempts to alleviate the humiliation she was experiencing.⁴⁷

As shown, this *wanghong* utilised a combination of strategies that involved lying, reframing, publicly shaming attackers, further controversy-seeking and clarification. However, despite her efforts and her continued online ‘visibility labour’⁴⁸ – which included online posting, uploading and interacting with followers on Weibo – her livestreaming and *wanghong* career ended. As of the time of writing, all of her livestreaming accounts, including those in and outside of China (i.e. Twitch and YouTube) remain inactive. Although she posts diligently on Weibo, with at least one post every day for the last four years, her Weibo posts now rarely receive any comments or likes.

Qiao Bi Luo Dian Xia was open about her intentions to leverage her scandal as a business opportunity to attract capital investment and elevate her *wanghong* business.⁴⁹ However, due to the reasons given by the DouYu platform and CAPA, her openness as a business person to intentionally self-promote her *wanghong* brand persist. Although the ‘real’ reasons for her ban are not the focus of this analysis, based on the public sentiment exemplified in online media reports, her self-promotional strategies were interpreted as capitalistic and profit-seeking behaviour against socialist morals.⁵⁰ Such public sentiment against self-promotion is also evident in the next *wanghong* that we examine, Yang Chengang.

⁴⁶ Longshi ‘主播”萝莉变大妈”事件，最新结果来了！_乔碧’ (Sohu, 1 August 2019) <https://www.sohu.com/a/330849775_293417> accessed 23 June 2024.

⁴⁷ Sina ‘乔碧萝是50岁大妈？她才29岁：梦想成为商业大亨’ (Sina, 8 December 2019) <<https://news.sina.com.cn/s/2019-12-08/doc-iihnzhfz4450187.shtml>> accessed 23 June 2024.

⁴⁸ Abidin (n 14).

⁴⁹ See Wenyao Li ‘“乔碧萝殿下”回应斗鱼封禁：28万炒作 希望融资. 环球网’ (Huanqiu, 1 August 2019) <<https://www.huanqiu.com/article/9CaKrnKIUFU>> accessed 23 June 2024.

⁵⁰ Yuan Yang ‘网络直播视野下的缄默形式诈...—以”乔碧萝殿下事件”为例’ (2019) 39 Kaifeng Edu 265; Xiwen Mei ‘拟剧理论视域下女性游戏主播...思—以”乔碧萝事件”为例’ (2020) 4 Shiting 133.

4.2 Yang Chengang

Yang Chengang is known as one of China's first and most popular *wǎngluò gēshǒu* (网络歌手, hereafter *wangluo geshou*; literal translation 'internet singer'). After one of China's earliest digital creators, Xiangxiang (香香), uploaded a video of him singing the single, Mice Love Rice, to 163888 (a prevalent music website at the time) and Baidu, the song went viral.⁵¹ By 1 November 2004, the song title had appeared in 185,500 online searches, and 20 days later, the search count had risen to 6 million, producing 170 million yuan (AUD 36.4 million) in revenue.⁵² However, shortly after his internet fame, Yang Chengang was sued by record company Tai Ge Yin Xiang (太格印象) for copyright infringement, and then another *wangluo geshou*, Yang Qiwen (杨启文), claimed to be the original singer of the popular single, suing Yang Chengang for copyright infringement. The court rejected the lawsuit because of the single's 'chaotic copyrights' (版权混乱), stating that all parties had a 'lack of honesty and credibility' (不诚信).⁵³ Rather than address the 'real' truth and legal investigations, our analysis focuses on Yang Chengang's strategies to sustain his visibility and income through the scandal.

Like Qiao Bi Luo Dian Xia, Yang Chengang is a 'controversy-seeking'⁵⁴ *wanghong* who set out to leverage scandals to rise back to his fame. This includes not only creating his own dramas but also piggybacking on other high-profile scandals. One of his attempts to piggyback on other scandals was by donating to a well-known fan of singer Andy Lau, Yang Lijuan (杨丽娟), who was the subject of several tabloids and online discussion due to her obsessive fan behaviour. In 2007, Yang Lijuan's father committed suicide following bankruptcy due to his daughter's pursuit of travelling to Hong Kong to meet Andy Lau in person, which incited heated discussions online. Yang Chengang supported Yang Lijuan openly and gave her money to bury her father. This was criticised by the public as an attempt by Yang Chengang to harness Yang

⁵¹ Sohu Music '杨臣刚香香做客搜狐:《老鼠爱大米》卖了一个亿' (Sohu, 25 May 2005) <<http://music.yule.sohu.com/20050525/n225697998.shtml>> accessed 23 June 2024.

⁵² Xiaojun Wei '杨臣刚是过气歌手? 44岁收徒, 人家不声不响挣了几亿' (Sina, 30 March 2023) <https://k.sina.cn/article_1223495752_48ed104800101neag.html?from=ent&subch=star> accessed 23 June 2024.

⁵³ Yan Shi '老鼠爱大米' 版权混乱 因不讲诚信判决驳回诉求. 北京法院网' (BJ Court, 7 December 2006) <<https://bjgy.bjcourt.gov.cn/article/detail/2006/12/id/847884.shtml>> accessed 23 June 2024.

⁵⁴ Abidin (n 3).

Lijuan's notoriety and gain attention from Andy Lau's fans.⁵⁵ Despite Yang Chengang's efforts, most discussions centred on Yang Lijuan and the concern about illegal and irrational fan behaviour.

More than a decade later, Yang Chengang's attempt to piggyback on the fame of a late singer was again criticised by the public. In 2016, the memorials for Wong Ka Kui (lead singer of the Hong Kong music band Beyond) were a hot topic as a group of Hong Kong high-profile celebrities hosted a charity music ball in his name.⁵⁶ A few days after the music ball, Yang Chengang recorded himself singing and 'drinking with' Wong Ka Kui at his tomb in Hong Kong. This act damaged his reputation even further since the little attention he attracted from the public was critical of his attempt to exploit a dead person's reputation just to regain fame.⁵⁷

Yang Chengang's most recent attempt to boost his publicity on livestreaming platforms was by staging a *bàishīxuéyì* (拜师学艺, hereafter *baishixueyi*; literal translation 'establish the apprenticeship') performance for Wong Ka Kui. *Baishixueyi* follows a pre-PRC tradition where apprentices get on their knees to offer their master tea (敬茶; *zhēnchá*), as recognition of their formal relationship. Although this act did not attract much attention from the public, the online discussions that followed continued to condemn his behaviour, as he was perceived to have arrogantly and ignorantly equated himself to being an apprentice of one of the most established singers (i.e. Wong Ka Kui) in Hong Kong's music history.⁵⁸

Yang Chengang adopts a strategy that is a combination of remaining silent and 'controversy-seeking'.⁵⁹ However, his attempts, similar to that of Qiao Bi Luo Dian Xia, were interpreted by the public as distasteful self-publicity, which have led to further condemnation.⁶⁰ Based on the two cases, the commercial

⁵⁵ Jie Sun '杨丽娟母女抵京接受杨臣刚捐赠 记者会疑窦重重' (CCTV, 4 May 2007) <<https://news.cctv.com/performance/20070405/102564.shtml>> accessed 23 June 2024.

⁵⁶ Qilu. '赚了几个亿还不够! 杨臣刚直接去黄家驹坟头"K歌.'" (Fenghuang, 21 June 2016) <http://news.ifeng.com/a/20160621/49208881_0.shtml> accessed 23 June 2024.

⁵⁷ Yuanxing Dou '怀念还是炒作? 杨臣刚在黄家驹墓地拍照唱歌-搜狐新闻' (Sohu, 17 June 2016) <<https://news.sohu.com/20160617/n454893145.shtml>> accessed 23 June 2024.

⁵⁸ Xiaojie Mo '44岁歌手杨臣刚收徒, 徒弟现场三跪九叩, 网友: 用纸杯敬茶太寒酸 仪式 老鼠 大米' (30 March 2023) <https://www.sohu.com/a/659616260_121336366> accessed 23 June 2024.

⁵⁹ Abidin (n 3).

⁶⁰ Sina News '杨臣刚给杨丽娟父亲办丧 朋友网友骂其炒作(图)_手机新浪网' (Sina News, 3 April 2007) <<https://ent.sina.cn/2007-04-03/detail-icczmvn3933049.d.html?from=wap>> accessed 23 June 2024.

strategies and viability labour of *wanghong* who identify as entrepreneurs are seen to be ineffective in the Chinese context. Furthermore, the self-promotion efforts may even have become the very cause of the *wanghong*'s ban (either by platforms or the industry association, CAPA) and unfavourable public sentiments, which limits their opportunities to continue to work and succeed in the industry.

5 STRATEGIES OF POLITICISED PERSONAS AND THEIR FAVOURABLE OUTCOME IN CHINA

5.1 Xin Ba

Xin Ba is the CEO and founder of one of the biggest *wanghong* agency companies and e-commerce brands with over 300 million followers.⁶¹ Despite being banned for various reasons, he has managed to come back each time. In October 2019, he was banned twice by the Taobao platform for selling dangerous products and using vulgar words during livestreaming. In 2020, he was sued by multiple provincial bureaus and subsequently banned and fined for selling fake products. After only 60 days and paying a fine of 900,000 yuan (AUD 195,000), he returned to livestreaming.⁶² In 2021, he was banned yet again by Kuaishou for what was considered vulgar performance because of using curse words in his livestreaming sessions. In March 2023, he was banned permanently by Kuaishou. However, within hours of announcing the ban, the platform changed the duration of the ban from permanent to only a few hours.⁶³ To date, Xin Ba continues to livestream on various platforms, and his most recent record was over 2.2 billion yuan (AUD 470 million) in sales on a single day – Taobao's August 18 e-commerce festival in 2023.⁶⁴

Like Qiao Bi Luo Dian Xia and Yang Chengang, Xin Ba is a 'controversy-seeking'⁶⁵ *wanghong*. He repeatedly stirs up drama in his livestreaming sessions, targeting and accusing platform Kuaishou of unfair and

⁶¹ Dongshan Zhao '辛巴，为何被众人嫌弃？. 虎嗅网' (*Huxiu*, 23 September 2022) <<https://www.huxiu.com/article/669333.html>> accessed 23 June 2024.

⁶² Weijing Chu '燕窝风波后辛巴快手账号被封60天！旗下27名主播封号半月' (*Southern Metropolitan*, 23 December 2020) <<https://m.mp.oeeee.com/a/BAAFRD000020201223400817.html>> accessed 23 June 2024.

⁶³ Yi San '再被封停，辛巴反复“作死”却凉不透背后的逻辑-36氪' (36 kr, 10 March 2023) <<https://36kr.com/p/2165557192339715>>.

⁶⁴ Zhiqiang Li '一年带货500亿 当辛巴和他的徒弟们“低垂的果实”摘尽，然后呢？' (*STCN*, 25 August 2023) <<https://www.stcn.com/article/detail/958376.html>> accessed 23 June 2024.

⁶⁵ Abidin (n 3).

unfavourable treatment. However, his comebacks are often after his monetary donations to local governments and government-sanctioned organisations. For example, within the same month of his largest scandal around selling fake products, Xin Ba donated 150 million yuan (AUD 32.3 million) to the municipal of Wuhan, supporting the work in battling the COVID-19 pandemic.⁶⁶ Although Xin Ba managed to return to livestreaming after his donation, in January 2020, the Henan Provincial Consumer Association sued Xin Ba and advocated for permanently banning him from livestreaming. Two months later, Xin Ba became an Honorary Vice Secretary of this province's Charity Network after donating 200 million yuan (AUD 42.6 million). The result of this lawsuit was not disclosed to the public, and Xin Ba continued to livestream after the event.

In contrast to the two *wanghong* mentioned above, who are open about their commercial pursuits, Xin Ba's online public persona is an entrepreneur of rural and peasant origin who supports, promotes and contributes to the nation's rural development. Xin Ba, long before his first financial scandal, nicknamed himself '农民的儿子' (*nóngmíndeérzi*, literal translation 'the son of a peasant'), claiming to be someone who represents and cares about the hardworking farmers and peasant workers. Below is how he explains his business in one of his Weibo posts:

Farmers have hard lives. The products they grow are great. [I] package them and their products to help them live better. (Xin Ba, 13 November 2020)

His Weibo posts, instead of commercial content, are filled with photos of him (and his father) giving money to farmers in rural or disaster-impacted areas.

As such, Xin Ba has consistently politicised his persona as 'the son of a peasant'. This persona has particular connotations – i.e. officially and politically classified as one of oppressed and good family origins – in China's unique historical context.⁶⁷ Very much opposed to the business person that he is, he paints himself as a philanthropist who comes from a peasant background, and claims to represent and serve his fellow citizens. Especially during the time of scandals, Xin Ba highlights his politically correct social identity rather than his business agenda.

⁶⁶ Xinkai '辛巴为武汉疫情捐款1.5亿，有如此大爱的人为何却卖糖水燕窝?' (163, 5 December 2020) <<https://www.163.com/dy/article/FT3SVR4E0517NPVF.html>> accessed 23 June 2024.

⁶⁷ Zhiming Cheng, M Tani and B Torgler, 'Is there hope after despair? An analysis of trust among China's Cultural Revolution survivors' (2023) 121 *Economic Modelling*.

His primary strategy, after each incident, is to make donations to government bureaus and government-related associations under the banner of supporting the government's work in helping those in need. His *modus operandi* consolidates as a longer-term strategy to establish himself as a politically favourable persona. Both strategies contribute to his repeated successful mitigations of scandals, even when up against the platform's self-regulatory actions.

5.2 Li Ziqi

Similar to Xin Ba, Li Ziqi is one of the few *wanghong* who has leveraged her politicised persona to make a return to livestreaming. Li Ziqi is one of the most prominent *wanghong* who specialises in *gǔfēng* (古风; literal translation 'antiquity style'), *hùwài* (户外; literal translation 'outdoor') and *měishí* (美食; literal translation 'cuisine'). She has over 100 million followers across social media platforms, half of whom are Douyin (TikTok's Chinese version) users. She is widely considered by the general public as a national icon and a positive representation of Chinese culture to the international community. However, she has paused online production since 2021 due to financial disputes with her agency company, Wei Nian (微念). Her disputes with Wei Nian centre around her wish to own her brand and labour.

This dispute took on the form of a scandal resembling the messy claims observed in Yang Chengang's copyright case during which Li Ziqi remained silent. The turning point of the event was marked by Li Ziqi's lawsuit against Wei Nian. It is significant to note that what perhaps distinguishes Li Ziqi's case from lawsuits outside of the Chinese context is her leveraging of her politicised persona.

Immediately after the lawsuit, Li Ziqi's interview with China Central Television (CCTV) was released. In this interview, she claimed to have come from a rural background, a broken home and was returning to the countryside from a city migrant life to care for her elderly grandmother. In addition, she shared that her motivation for becoming a *wanghong* were to disseminate traditional cultures, spread goodness to more people, and support rural development. Xinhuanet⁶⁸ commentated that the world needs more people like Li Ziqi, who reproduces authentic Chineseness and promotes China's intangible heritage.

⁶⁸ Xinhuanet '全球连线 | 对话李子柒: 热爱可抵漫长黑夜-今日头条' (*Toutiao*, 28 September 2021) *Toutiao* <https://www.toutiao.com/article/7012931736837292557/?source=seo_tt_juhe> accessed 23 June 2024.

Other than interviews with official media, Li Ziqi has since produced little online content or self-promotion. Between the event in 2021 and this research in 2023, she has posted just three Weibo posts. The first one wishes a happy birthday to China on its National Day (the annual celebration of the founding of the People's Republic of China). The second one led with a hashtag addressing China's Supreme People's Procuratorate:

#China's Supreme People's Procuratorate# [I] Build beautiful countryside with down-to-earth work, share beautiful and good lives, and provide every villager with a sense of achievement, happiness, and security. @China's Supreme People's Procuratorate How are the public prosecutors contributing and serving rural regeneration and development? (Li Ziqi, 2022)

This second post was part of a coordinated Weibo campaign organised by the Supreme People's Procuratorate, which encourages the public – represented by a select group of public figures – to use social media to ask questions. Li Ziqi utilises her officially acknowledged status as a *wanghong* who contributes to improving the perception of rurality, to question the Supreme People's Procuratorate's role in supporting her cause. Her goal here appears not to be to draw more public attention to herself but rather to leverage her reputation to favourably impact the outcome of her lawsuits, as she is not just addressing any government bureau but the Supreme People's Procuratorate.

Since her dispute, Li Ziqi's YouTube account has attracted over 2.3 million new followers, and her Taobao e-commerce store made over 40 million yuan (AUD 8.57 million) in monthly sales in 2023.⁶⁹ On 15 September 2023, Li Ziqi posted her first video since her financial dispute to announce her new role as a China Agricultural and Harvest Festival Ambassador (中国农民丰收节推广大使). This video immediately rose to be the number one most searched topic on Baidu's 'Hot Search Ranking List' (热搜榜, *rèshōubǎng*) of the day.⁷⁰

Like Xin Ba, Li Ziqi has built one of the most successful *wanghong* businesses in China but is yet to claim to be a businessperson. However, if we look at her disputes with her agency, at the centre of their conflicts are money and capital, i.e. who has dominant control of their joint company.⁷¹ The result of

⁶⁹ Xiang Li '李子柒停更一年，每月还能收79万广告费_联商网' (*Linkshop*, 11 April 2023) <<https://m.linkshop.com/article/news/502323>> accessed 23 June 2024.

⁷⁰ Peng Cheng and Qijiang Yi '33岁李子柒，归！网友：好久不见' (*Baidu*, 16 September 2023) <<https://baijiahao.baidu.com/s?id=1777184535901792417&wft=spider&for=pc>> accessed 23 June 2024.

⁷¹ Weihua Wang and Yi Dong '新中国成立70年来人的主体性发展的经济哲学反思' (2019) 11 *Social Sciences in Guangxi*.

her lawsuit against her business partner also centres on money and capital – her share of their joint company changed from 49% to 99%. Nonetheless, as Xinhua and CCTV (two of the most critical Party media) have reported, Li Ziqi is the victim of a cunning and exploitative *wanghong* agency that exploited her innocence, given her ‘less-educated’ and ‘inexperienced’ background being of rural origin.⁷²

Under the lead of China’s official media, Li Ziqi is portrayed similarly to Xin Ba as someone who did not become a *wanghong* for money – despite building one of the most lucrative *wanghong* brands – but to represent and support rural development. As demonstrated by her strategies discussed above, since her financial disputes, Li Ziqi has dealt with the scandal precisely not as a *wanghong* but as an ambassador and promoter of China’s rural and agricultural economy domestically and internationally. This finding echoes previous research that attributes Li Ziqi’s career and financial success to her roles in serving China’s need to encourage rural development and establish a positive image domestically and internationally.⁷³ Li Ziqi’s case, in a similar light to that of Xin Ba’s, demonstrates that being complicit with the Party-State’s political and propaganda agenda is a crucial factor that impacts a *wanghong*’s ability to withstand scandals and disputes, sustaining their visibility and income in the Chinese context. This is one of the many unique characteristics that researchers should take into consideration when examining the labour practices of *wanghong* in China.

6 CONCLUSION

In this chapter, we have considered how four highly prolific *wanghong* have been embroiled in major scandals. Situated against a trio of socio-political contexts – stringent Chinese governance, the industry regulation of *wanghong*, and the court of public opinion in highly interactive and reactive Chinese internet fora – we examine how and why each *wanghong* in the case study survived (or did not) the public backlash through strategies of rebranding and creating a new narrative to *chongchu jianghu*, or ‘make a strong comeback’.

Qiao Bi Luo Dian Xia and Yang Chengang’s repeated controversy-seeking antics have saturated the public palette and they have been condemned for their self-publicity. However, they have struggled to return to the good graces

⁷² Xinhuanet (n 68).

⁷³ Highhouse ‘China content on TikTok: The influence of social media videos on national image’ (2022) 1Online Media and Global Communication 697; Virginie Arantes ‘Towards a Green Nationalism with Chinese Characteristics?’ 2023 Journal of Contemporary China 1.

of the public as their behaviours were deemed to be hyper-capitalist, intended for profit-seeking, through exploiting the image, fanbase, or downfall of established public figures. On the other hand, Xin Ba and Li Ziqi's scandals were managed to skilfully turn the tide and attract public sympathy and support. In recrafting their comebacks, they politicised their public persona as being a 'person for the masses', soliciting conversions in public opinion that they are simply a fellow everyman who have been unfairly judged or harmed by government regulations or industry and platform stipulations. At the heart of the matter is how socialist values, or at least the impression or guise of them, have been interwoven into the reinterpretations and resolutions of each scandal; government and public tolerance and forgiveness appear to be more generous when the *wanghong* appear to fulfil their cultural responsibilities above their own entrepreneurship, and where their post-scandal comebacks have aligned with the Party-State's political interests.

PART II

Empirically mapping influencer labour: Evidence, practices and harms

5. Market incentives and advertising disclosure regulations

Daniel Ershov

1 INTRODUCTION

Influencers – popular social media users who monetise the attention they receive through commercial arrangements with brands – are often portrayed as “sincere” or “authentic” advertisers.¹ However, it is important to remember that they are economic agents whose behaviour responds to incentives. At a high level, an influencer chooses how much content to post, what type of content to post (sponsored content produced in partnership with brands, or organic content), and whether or not to disclose any sponsored content they posted. When choosing a particular action, influencers weigh its benefits and costs relative to alternatives. For example, when deciding whether to post an additional piece of sponsored content or organic non-paid content, creators weigh the benefits of additional income from payments from brands, against the potential cost of reduced attention and trust from followers. Ultimately, they are not unlike traditional content creators, such as TV stations or magazines, which mix advertising content and “organic” non-paid content. Legally, the boundaries of how influencers are defined, or the regulations that govern them, are murky,² but the average influencer still responds to incentives.

¹ Sophie Elmhirst, “‘It’s genuine, you know?’: why the online influencer industry is going ‘authentic’” (*The Guardian*, 5 April 2019) <<https://www.theguardian.com/media/2019/apr/05/its-genuine-you-know-why-the-online-influencer-industry-is-going-authentic>> accessed 23 June 2024.

² See, for example, Catalina Goanta and Isabelle Wildhaber, “In the business of influence: Contractual practices and social media content monetisation” (2019) *Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht*, SZW, 4; Catalina Goanta and Sofia Ranchordás, “The regulation of social media influencers: An introduction” in Catalina Goanta and Sofia Ranchordás (eds), *The Regulation of Social Media Influencers* (Edward Elgar 2020).

Changes in regulations associated with sponsored content inevitably affect the incentives of influencers and their decision-making. A particular example is the stronger proposed regulations on the disclosure of advertising content on social media, such as the recent 2023 French consumer protection laws. These laws restrict the set of products that influencers can advertise (e.g., no tobacco products or medical devices), as well as specifying precise disclosure terms that should be posted with all sponsored content, at the risk of facing fines, or being forced to post a “black banner” stating that they failed to comply with the rules on their account.³ If influencers successfully disclose existing undisclosed advertising, following this law, it may affect the relationship between influencers and their followers. For example, it could negatively affect trust due to a greater understanding of the quantity of sponsored content in their feed. At the same time, knowing they will have to disclose all or some of their sponsored content, influencers may change their posting strategy *ex ante*. They may post more or less content of any kind, or change the quality of the content that they post.

The goals of most regulations targeting influencers are clear – protecting consumers and maximising their well-being. French social media advertising regulations clearly state that their goal is to protect consumers and social media users from fraud or malpractice.⁴ Similarly, the US Federal Trade Commission’s (FTC) jurisdiction over advertising falls under Section 5 of the FTC Act, which allows the FTC to levy fines that compensate consumers for any harms experienced from misleading, deceptive, or improperly disclosed endorsements.⁵ However, it is crucial to carefully think about how any changes in regulations will affect influencer incentives ahead of time. This chapter surveys the recent literature on influencers as economic agents, and how their incentive schemes and actions influence the implementation of advertising

³ Angelique Chrisafis “French social media influencers feel the heat over new law on paid content” (*The Guardian*, 11 November 2023) <<https://www.theguardian.com/world/2023/nov/11/france-social-media-influencers-feel-heat-law-paid-content>> accessed 23 June 2024.

⁴ Proposition de loi n°790 <https://www.assemblee-nationale.fr/dyn/16/textes/116b0790_proposition-loi> accessed 23 June 2024.

⁵ Federal Trade Commission “FTC’s Endorsement Guides: What People Are Asking” (2023), <<https://www.ftc.gov/business-guidance/resources/ftcs-endorsement-guides-what-people-are-asking>> accessed 23 June 2024.

disclosure regulations.⁶ In particular, the focus is on three recently published or forthcoming economics papers.⁷

Each of these papers formally studies a different aspect of the relationship between influencers and followers, and a different mechanism through which changes in disclosure requirements could affect this relationship. As is standard in economics and marketing, their arguments are formalised through game-theoretical mathematical modelling. Each paper develops a situation, a “game”, where “players” (i.e., influencers or followers) make decisions that affect one another. Each game defines the actions that players could take, and the effects or outcomes of these actions on the players – the “payoffs” players could receive. Both the actions and payoffs are defined explicitly through mathematical expressions. Each game is then solved to discover the “equilibrium”, the combination of actions from which no player has an incentive to deviate. For example, this may be the condition under which an influencer chooses to post sponsored undisclosed content (over organic content), and the follower chooses to pay attention to that content (over not paying attention to that content). Although these models are necessarily abstract, their goal is to capture the fundamental features of reality and generate actionable insights into the decision processes of the players involved.

The remainder of this chapter will survey each of the three papers in turn, using simple, non-technical language to outline their theoretical arguments

⁶ The literature on influencers in economics and management is rapidly growing. Additional recent related theoretical papers see Mohamed Mostagir and James Siderius, ‘Strategic reviews’ (2023) 69 *Management Science* 904; Amy Pei and Dina Mayzlin, ‘Influencing social media influencers through affiliation’ (2022) *Marketing Science* 593. For recent published empirical work see Christian Hughes, Vanitha Swaminathan and Gillian Brooks, ‘Driving brand engagement through online social influencers: An empirical investigation of sponsored blogging campaigns’ (2019) *Journal of Marketing* 78; Zike Cao and Rodrigo Belo ‘Effects of explicit sponsorship disclosure on user engagement in social media influencer marketing’, *MIS Quarterly*, forthcoming. This literature also relates to an older literature on firm-driven word-of-mouth communications, see Dina Mayzlin, ‘Promotional chat on the Internet’ (2006) *Marketing Science* 155; and David Godes and Dina Mayzlin ‘Firm-created word-of-mouth communication: Evidence from a field test’ (2009) *Marketing Science* 721.

⁷ Matthew Mitchell ‘Free ad(vice): internet influencers and disclosure regulation’ (2021) *RAND Journal of Economics* 3; Itay P. Fainmesser and Andrea Galeotti ‘The market for online influence’ (2021) *American Economic Journal: Microeconomics* 332; Daniel Ershov and Matthew Mitchell ‘The effects of advertising disclosure regulations on social media: Evidence from Instagram’ *RAND Journal of Economics*, forthcoming.

or empirical methodology. Then, this chapter will discuss and compare the three approaches and evaluate what empirical evidence we have to support or dismiss any of the arguments. Finally, the chapter will conclude with some speculative thoughts about how to improve advertising regulations.

2 REPUTATION BUILDING

Mitchell's paper⁸ considers the dynamics in the repeated interactions between a representative (i.e., average) influencer and a representative follower. Their setting considers an influencer making the same decision over a number of "periods" (i.e., posting opportunities) – whether to post sponsored or organic content. The two types of posts offer the influencer different benefits (i.e., revenues), and the follower different "utility" (i.e., satisfaction from reading these). A sponsored post produces higher revenues for the influencer but has zero utility for the follower, as compared with an organic post, which generates no revenues for the influencer but some positive utility for the follower. Both types of posts come at some cost to the influencer, representing the time and effort required to make creative content online. Clearly, this introduces the central trade-off for the influencer – how much content should they post that is better for them but not good for the followers, and when should they post more of that content? This trade-off is present for many influencers, whose followers often actively dislike the ads they post.⁹

Once the influencer chooses to post a particular type of post, the follower chooses whether to read it. In a world without regulations, the follower does not know whether a post is sponsored or organic ahead of reading it. However, they have information about all previous posts the influencer has posted and whether these have been sponsored or organic. The key idea in this chapter is that ahead of choosing whether to pay attention to any new post, the follower considers this past information and forms a prediction about whether the next post from the influencer is going to be sponsored or organic. The influencer knows that this is the follower's thought process. This exacerbates the previ-

⁸ Mitchell (n 7).

⁹ For instance, Kylie Jenner's followers often mock or criticise her ads for various drinks or supplements. For examples, see Heather Gardner, 'We're confused — why is near billionaire Kylie Jenner promoting detox tea on Instagram?' (*Yahoo News*, 31 July 2018) <<https://www.yahoo.com/entertainment/confused-near-billionaire-kylie-jenner-promoting-detox-tea-instagram-185140304.html>> accessed 23 June 2024; Katie Francis, 'Kardashian fans mock Kylie Jenner for new drink ad and agree she's 'not selling it' in new photos of star in tight dress' (*The Sun*, 14 May 2023) <<https://www.the-sun.com/entertainment/8114983/kardashian-kylie-jenner-mock-drink-ad-tight-dress/>> accessed 23 June 2024.

ously discussed tension in the model – although the influencer would ideally post only sponsored content, they cannot do so. The follower will start to anticipate that they will only see sponsored content from the influencer, and will stop paying attention as a result.

What comes out of the “equilibrium” of the model is the need for the influencer to establish a good reputation with the follower. The influencer’s optimal strategy is to initially provide the follower with a large volume of high-quality organic content, building their reputation, and establishing follower predictions that content will continue to be organic. Then, once the reputation is established, the influencer can cash in on that reputation (and on the follower’s expected attention) by posting a large amount of sponsored content. Then, as the influencer’s reputation dwindles and the follower is on the verge of not paying attention, the influencer resumes providing organic content. Interestingly, in the model, the follower knows and understands this strategy and chooses to pay attention to the influencer’s posts even during the sponsorship-heavy periods. The reason for this is that they know that the influencer will have to revert to posting more organic content in the future, and the influencer posts just enough content to keep the follower’s attention. This setup captures some of the fundamental dynamics of the market – the vast majority of Kim Kardashian’s followers do not stop following her once she posts some sponsored content, because they know that she will resume posting content they enjoy soon. They anticipate being advertised some products that Kim Kardashian is promoting in return. Moreover, influencers early on in their careers “invest” more in higher-quality content with less advertising. They do so both to convince followers that they are worth following for the long run, and also to convince advertisers that they have enough follower attention to monetise.

Disclosure regulations enter the model by reducing the benefits that the influencer receives from posting a sponsored post. This is meant to capture the lower attention that an average disclosed sponsored post by influencers receives from their followers.¹⁰ Interestingly, in this setting a reduction in the benefits of a sponsored post will not necessarily reduce the total amount of sponsored content influencers create. The reason for this is that the influencer has to cover the costs they incurred in gaining follower attention through organic posts. Therefore, as per-post benefits fall, the influencer wants to create more sponsored content to earn revenue and recover the investment they previously put into organic content. This is the case for established influencers, but there is also a distinct effect on new influencers. The reputation influencers build with their followers through their organic content is predicated on the

¹⁰ See additional evidence in Ershov and Mitchell (n 7), discussed below.

future benefits they will receive when they start “cashing in” through sponsored content. As a result, a reduction in the benefits coming from sponsored content reduces the expected future benefits for new influencers and disincentivises them from producing additional organic content earlier on. Therefore, advertising disclosure regulations in this model can both reduce the amount of organic content in the market and increase the amount of sponsored content.

Mitchell proposes several alternative policies that regulators could follow to maximise follower well-being – i.e., to increase organic content and minimise sponsored content that followers do not like. The most important suggestion is to have stricter disclosure guidelines and enforcement for new influencers as compared with established influencers. Put another way, more sponsored content by less established influencers will be disclosed, and less content by more established influencers will be disclosed. The idea is based on the mechanism described above. Laxer standards for established influencers maximise the benefits new influencers anticipate receiving from sponsored content in the future, which improves their incentives to post organic content earlier on. The stricter disclosure guidelines for less established influencers also dissuade them from producing more sponsored content. Interestingly, this is the opposite of sponsored content regulations in most countries. Most of the time, regulations and enforcement are very strict for the “top” (most popular) influencers. For enforcement, this is likely the case because cases are driven by consumer complaints, and more established influencers have more followers who could complain. For example, when the FTC in the US sent warning letters to influencers in 2017, they only sent them to 90 mega-influencers and celebrities such as Naomi Campbell, rather than to a wider group of users.¹¹ These actions by the regulators are based on the idea that top influencers have the most eyeballs and that they may produce spillover effects on smaller influencers. However, it is not clear whether these spillovers fully materialised.¹² Moreover, it is plausible that the mass of all attention given to smaller influencers is actually larger than that given to the relatively few huge influencers that have been the focus of regulations thus far. Larger influencers may also

¹¹ David Ingram and Diane Bartz “FTC demands endorsement info from Instagram ‘influencers’” (*Reuters*, 2017) <<https://www.reuters.com/article/us-usa-ftc-celebrities/ftc-demands-endorsement-info-from-instagram-influencers-idUSKCN1BO2TE/>> accessed 23 June 2024.

¹² There is no evidence that the effects of the warning letters expanded to the broader set of influencers, such as micro-influencers.

have inherent incentives to disclose sponsored content, as they are concerned about the reputational effects of non-disclosure and misleading customers.¹³

It is important to note that while the model in this chapter captures an important mechanism, it abstracts from many factors about the industry. This is a model where followers cannot be “deceived” about the content that they are consuming. In addition, this chapter only models the relationship between one influencer and one follower, without considering the choices followers make between different influencers. These aspects are discussed next.

3 INFLUENCER COMPETITION

The paper by Fainmesser and Galeotti¹⁴ models interactions between multiple influencers and followers.¹⁵ In this setting, the followers are identical, but influencers vary in terms of the “inherent” quality of content they post – some influencers post better (organic and sponsored) content than others that followers simply like more.¹⁶ In this setup, followers should in principle all select the influencers with the highest inherent quality. However, the paper introduces friction where followers are not necessarily aware of all influencers in the market, and may not be able to find the highest-quality influencers. High inherent quality influencers are still going to have the most followers, but not all followers are aware of them, and so some lower-quality influencers are also going to have followers. In the model, this produces a power-law (hockey-stick shaped) distribution of follower counts that mimics the real-world distribution

¹³ A French survey of influencer disclosure by the ARPP (a self-regulatory advertising association) found that while top influencers with more than 1 million followers correctly disclosed approximately 70% of the commercial content they posted in 2020, only 40% of commercial content posted by influencers with approximately 10,000 followers was correctly disclosed. See <<https://www.arpp.org/influence-responsable/observatoire-influence-responsable/>> for additional details.

¹⁴ Fainmesser and Andrea Galeotti (n 7).

¹⁵ Marketers are also included in the model, though they play a relatively small role and are excluded from this discussion.

¹⁶ The language in Fainmesser and Galeotti (n 7) refers to recommendations that the influencers make – for example, for particular products. These can be either organic (i.e., not compensated and based on the influencer’s own experiences), or sponsored (i.e., compensated). The assumption in the paper is that influencers select better products organically than with sponsorship, leading to better outcomes for followers who receive more organic recommendations. For simplicity and consistency of language, content is simply referred to as sponsored or organic.

of nano-, micro-, macro-, and mega-influencers – i.e., there are a small number of high-quality influencers with a very large number of followers, and a large number of influencers with a small number of followers.

The key choice for each influencer, as in Mitchell's paper,¹⁷ is the share of sponsored content that they post. Sponsored posts are worse for followers than organic posts. In the baseline model, followers cannot distinguish between organic and sponsored content, and they simply choose to follow influencers based on the overall well-being they receive from these influencers (the sum of an influencer's inherent quality, and the quality of the content they post). It is important to note that influencers are competing with one another in this setting. An influencer knows that if they increase the share of sponsored content they post, their quality will fall, and they will receive fewer followers. The extent of the sensitivity of the number of followers to the share of sponsored content depends on the friction in the market described above. Without any friction, the model predicts that the optimal choice for influencers is to post no sponsored content, since followers would only follow the highest overall-quality influencer, and any sponsored content reduces overall quality. With friction, influencers know that reducing their quality by posting additional sponsored content will not necessarily drive all of their followers away. As such, influencers with higher inherent quality know that they attract more followers, and so they have additional followers to lose by posting more sponsored content. Therefore, in equilibrium, the model predicts that larger influencers, who generally have higher inherent quality, will exploit their position by posting more sponsored content. Notably, this is both consistent with real-world outcomes and with Mitchell's predictions, though those come from a completely different model and a different setup. Unlike Mitchell's model, this is a "static" model – it is not concerned with the evolution of influencers' content, but rather with a "snapshot" of the market at one point in time.

Fainmesser and Galeotti simulate disclosure regulations in the model by giving followers the ability to distinguish between sponsored and organic content and ignore sponsored content. They also introduce heterogeneity to the followers – some followers are more likely to ignore sponsored content than others. Holding everything else constant, followers who ignore sponsored content receive higher benefits from following the same influencer as before.¹⁸ This reflects the ability of many followers on social media to simply ignore or scroll through sponsored content in their feeds without paying a substantial

¹⁷ Mitchell (n 7).

¹⁸ The reason for this is that they still benefit from the influencer's inherent quality, but are now also able to get higher benefits from their content by only paying attention to organic posts and not to sponsored posts.

amount of attention to it, especially if it is clearly disclosed. If the amount of sponsored content in the market does not change, this should increase follower well-being. However, the influencers respond to these regulations by changing the amount of sponsored content they post. In particular, influencers know that some of their followers now no longer care about how much sponsored content they post. This means that, in a world with transparency regulations, if they increase their share of sponsored content, they will lose fewer followers as compared with a world without transparency regulations. This creates perverse incentives, effectively reducing competition between influencers and increasing the amount of sponsored content in the market, as each influencer attempts to earn more money out of their remaining followers who pay attention to the sponsored content. This change in the share of ads has no effect on the followers who do not pay attention to sponsored content. But it does substantially reduce the well-being of the other followers who still consume advertising and who are now substantially worse off. Compared with a world where there is no mandated transparency, these followers are now “stuck” with a higher ad load influencer.

All in all, this paper produces another channel through which the introduction of mandated transparency affects influencers’ incentives in a way that affects the utility of social media users. In this case, competition between influencers is the main channel through which the effects occur. One policy suggestion from Fainmesser and Galeotti is that reducing platform frictions will intensify competition between influencers and reduce the overall ad load in the market. In practice, this means the collection of additional data on social media users so that better influencers can be recommended to them. Of course, this introduces further issues, as additional data collection by platforms can result in worse outcomes for social media users for a variety of other reasons.

4 POROUS REGULATIONS

Ershov and Mitchell’s paper¹⁹ focuses on another aspect of the influencer and follower relationship that is not directly accounted for by the other papers discussed above, but that plays an important role in any proposed regulation of social media markets: the language of posts, the beliefs of followers about the posts they see, and the presence of undisclosed advertising in markets, even after disclosure regulations. Similar to Mitchell’s earlier paper,²⁰ Ershov and Mitchell also consider a single representative influencer interacting with a rep-

¹⁹ Ershov and Mitchell (n 7).

²⁰ Mitchell (n 7).

representative follower, and similar to Fainmesser and Galeotti,²¹ this is a “static”/single snapshot model. As in the previous papers discussed in this chapter, the key choice by the influencer is whether to post sponsored or organic content. Sponsored content is better for the influencer but worse for the follower, and organic content is the opposite. Unlike the other papers, Ershov and Mitchell consider the actual content of posts. When an influencer chooses to post a sponsored post, this post has to include certain “sponsored language” – words that connote some commercial intent, or that are dictated directly by the brands that they are advertising for.²² When an influencer chooses to post an organic post, the post includes “organic language”. Some words between the two types of posts will overlap, but words that are common in sponsored posts will be rare in organic posts and vice versa. For example, if influencers can only use the two words “love” and “sale”, “love” would be more likely to appear in organic posts and “sale” would be more likely to appear in sponsored posts, although some sponsored posts may also include the word “love”.

A follower in this model does not know whether each post is organic or sponsored. The follower inspects each post briefly, and forms expectations/beliefs about whether or not it is sponsored based on the language it includes. For example, if a post includes the word “sale”, the follower infers that the post is more likely to be sponsored. Then, the follower pays attention to the post based on how sponsored they believe it is. Posts that followers believe to be more sponsored receive less attention. As before, the influencer’s key choice is the share of sponsored posts. In equilibrium, the optimal number of sponsored posts is based on the average amount of attention they expect followers will pay to sponsored posts compared with organic posts. Put another way, an influencer will not post additional sponsored content if they know that followers are going to reduce their attention. As in the previous papers, although this is an abstract model, it represents essential features of influencers’ content selection decisions, and their desire to maximise overall follower attention and engagement.

Disclosure regulations in this model reveal a portion of sponsored posts as sponsored. This is done by including disclosure words (i.e., “#AD”) that do not exist in organic posts and that perfectly inform followers that the post is not organic. For simplicity, the paper assumes that a random portion of sponsored content is revealed in such a manner. This is meant to capture the porousness of real-world regulations, where (i) regulations often have inherent uncertainty

²¹ Fainmesser and Galeotti (n 7).

²² See Goanta and Wildhaber (n 2) for examples of such contractual relationships.

about what content should be disclosed and are updated regularly,²³ and (ii) different brands contracting with influencers have different expectations about disclosure.

This form of disclosure regulations has two effects on followers' perceptions and behaviour in the model. On the one hand, followers now know that the disclosed sponsored posts are actually sponsored and as a result will choose to not pay any attention to those. On the other hand, their perception of posts without disclosure tags also changes. On average, followers are going to have higher "trust" in undisclosed sponsored posts, because they know that a portion of sponsored posts have been caught by the filter. As a result, they will pay more attention to all undisclosed posts, including undisclosed sponsored posts that "escape" disclosure. *Ex ante*, it is not clear which effect will dominate the other. Therefore, the effect of disclosure regulations on the share of sponsored content in the market, including on the share of undisclosed sponsored content, is inherently ambiguous, since influencers make choices based on total follower attention to sponsored content. If the lack of attention to disclosed posts dominates, influencers will start posting fewer sponsored posts compared with the baseline setting without disclosure regulations. If, however, the additional attention provided to non-disclosed sponsored posts dominates, influencers will post more sponsored content, with the expectation that some of these additional posts will escape disclosure and end up as undisclosed posts that capture substantial consumer attention.

5 EMPIRICAL EVIDENCE

There is a variety of existing empirical literature on the value of disclosure and whether disclosure negatively or positively affects engagement.²⁴ The results are often mixed, partially because of the difficulty of effectively establishing causality in real-world data, and the challenge of accurately simulating social media networks in lab settings. In addition, context matters for disclosure

²³ See more below on German regulations. In the US, the FTC released corrections and updates clarifying the existing rules regarding disclosure in 2017, 2019, 2020 and 2023.

²⁴ See Hughes, Swaminathan and Brooks (n 6); Navdeep S. Sahni and Harikesh S. Nair, 'Sponsorship disclosure and consumer deception: Experimental evidence from native advertising in mobile search' (2020) *Marketing Science* 5; Zeynep Karagür, Jean-Michel Becker, Kristina Klein and Alexander Edeling, 'How, why, and when disclosure type matters for influencer marketing' (2022) *International Journal of Research in Marketing* 313; Fine F. Leung, Flora F. Gu, Yiwei Li, Jonathan Z. Zhang and Robert W. Palmatier, 'Influencer marketing effectiveness' (2022) *Journal of Marketing* 93; and Cao and Belo (n 6).

effects. While an “average” lifestyle influencer does experience negative engagement effects from posting disclosed ads, niche influencers who post about very specialised topics (i.e., ski equipment) and have dedicated audiences do not. Nonetheless, as described below, the average engagement for disclosed sponsored content is lower than undisclosed content by the same influencer, and the perception in the industry is that disclosure is bad for engagement, leading to low disclosure rates.²⁵

In addition to their theoretical model, Ershov and Mitchell empirically evaluate the effects of changes in advertising disclosure regulations on the behaviour of influencers and on the interactions between influencers and followers. They evaluate the effects of changes in German influencer regulations. Germany has been a relatively early adopter of stricter regulations on influencers. Starting in early 2016, there were several initiatives, including by the German parliament, to impose stricter requirements for the labelling of advertising content on social media. In November 2016, the German Die Medienanstalten, a consortium of 14 state regulators, provided a set of new guidelines that mandate the disclosure of ad content.

The regulatory changes were succeeded by legal actions taken against several influencers following complaints from consumer protection groups, and resulting in fines. Among other cases, in 2017 a sports YouTube influencer was fined for non-disclosure of advertising.²⁶ Interestingly, legal activity in Germany differed from other countries that also introduced additional regulations on influencer activity. In the US and France, for example, regulators (e.g., the FTC) also introduced new guidelines about the disclosure of advertising content. However, only the largest influencers were ever targeted. The FTC sent warning letters to the most prominent mega-influencers (primarily celebrities with millions of followers).²⁷ By comparison, the German influencers that received fines were small, even in comparison with other existing German influencers. For example, one prominent early non-disclosure case was against an influencer with only 50,000 followers.²⁸ This is small compared

²⁵ See, for example, Arunesh Mathur, Arvind Narayanan and Marshini Chetty, ‘Endorsements on Social Media: An Empirical Study of Affiliate Marketing Disclosures on YouTube and Pinterest’ (2018) Proceedings of the ACM on Human-Computer Interaction 1, for evidence of very low disclosure rates for affiliate marketing on YouTube and Instagram.

²⁶ Dirk Spacek ‘Newsletter no. 119: Digital Influencer Marketing – Worldwide Legal Developments’ (*Walderwyss Newsletter*, October 2017) <https://www.walderwyss.com/user_assets/publications/2153.pdf> accessed 23 June 2024.

²⁷ Ingram and Bartz (n 12).

²⁸ Rossana Ducato, “One hashtag to rule them all? Mandated disclosures and design duties in influencer marketing practices. In Mandated disclosures

with some of the larger influencers in Germany, who have millions of followers. The end result of this is an environment where there is widespread concern by many influencers regarding potential legal action if they do not disclose the commercial content they post.

It is important to note that there appears to have been substantial legal uncertainty in Germany regarding the extent of regulations and enforcements. Different regional courts produced judgments that varied in severity, ranging from judges claiming that influencers must disclose every single one of their posts as ads (including non-explicitly commercial posts), to judges dismissing disclosure as unimportant. In that sense, disclosure rules are not “airtight” and there is no complete information about what should and should not be disclosed as sponsored. This means that, as in the theory model of Ershov and Mitchell’s paper,²⁹ some sponsored posts could “escape” disclosure even under the stricter regulatory regime.

To look at the effects of changes in disclosure regulations on influencer behaviour and follower engagement, Ershov and Mitchell use Instagram data from CrowdTangle.com.³⁰ They look at a random sample of 6,000 German influencers and their posts from 2014 to 2020. To benchmark the behaviour of these influencers, they look at a sample of 6,000 Spanish influencers for the same period of time. Unlike Germany, Spain’s regulations on commercial social media activity have not changed during the 2010s. As such, it is possible to think about this setting as a “natural experiment”, where Spanish influencers serve as a “control” group for the German influencers. Comparing the behaviour of the two before and after the regulatory environment changed in Germany should allow for identifying the effects of changes in regulations on the market.

Part of the challenge of this empirical exercise is that even if disclosure regulations fully disclose all sponsored content, there is a substantial period of time in Germany without regulations where sponsored content is hidden. Sponsored content is also hidden in Spain for the duration of the sample period. To uncover sponsored posts, Ershov and Mitchell use a machine learning procedure. They trained a classification model on a sample of disclosed-sponsored and undisclosed German posts. The goal of the model is to use the text of

and design duties in influencer marketing practices.” Catalina Goanta and Sofia Ranchordás (eds), *The Regulation of Social Media Influencers* (Edward Elgar, 2020).

²⁹ Ershov and Mitchell (n 7).

³⁰ CrowdTangle is a company owned by Meta that provides API-like access to public Facebook and Instagram data to researchers.

a post to predict whether it is a disclosed-sponsored post.³¹ The training of the model is done to maximise the number of disclosed-sponsored posts correctly predicted, rather than the number of undisclosed posts correctly predicted. As a result, there are a number of posts that the model predicts are disclosed sponsored posts because of their text, even though they are not actually disclosed. These are the undisclosed sponsored posts. After training the model on a sample, the authors apply its predictions to the remaining German and Spanish data.

They find that German regulations increased disclosure in Germany dramatically relative to Spain. This is – in and of itself – a notable finding which suggests that influencer disclosure decisions are responsive to regulatory changes, if these changes are strict enough.³² At the same time, they also show that the amount of sponsored content increases in Germany relative to Spain after the regulatory environment in Germany strengthens. The magnitudes are substantial. The main results in the paper suggest that the share of sponsored content increases by at least 12%, relative to the baseline. Interestingly, although disclosure increases, because of the increase in sponsorship, the share of non-disclosed posts that are sponsored does not fall, and in fact increases. This means that consumers are exposed to more undisclosed sponsored content after regulations. These results are consistent with the mechanism outlined in the theory model above – as the regulatory environment becomes stricter but remains porous and uncertain, influencers may want to increase the amount of sponsored content they post, since some of it is bound to escape regulatory attention and detection.

Additional analysis examines engagement. Engagement for German influencers falls after regulations. Both likes and comments decrease for the average influencer, as compared with their Spanish counterparts. This may be simply because of the increase in sponsored content, or because of the increase in disclosed sponsored content, which followers may not be happy with. The study shows that engagement also falls when only looking at undisclosed content

³¹ The authors also convert the text of posts from German or Spanish into multilingual embedding space, representing each post with a 300-dimensional vector, which captures its place in linguistic-meaning space. This helps deal with translation challenges, as well as other issues coming from variations in language over time.

³² Popular press discussions often dismiss the effectiveness of disclosure regulations at changing influencer behaviour, suggesting they would not even affect disclosure. For example, see: Amelia Tait, 'Forcing social-media influencers to be clear about #ads? Good luck with that' (*The Guardian*, 25 January 2019) <<https://www.theguardian.com/commentisfree/2019/jan/25/social-media-influencers-clear-ads-celebrities-authorities>> accessed 23 June 2024.

(sponsored and non-sponsored), suggesting that the former story is the case here. Although there is no direct analogy between engagement and consumer welfare, it does suggest that followers are not better off with the additional ads. Additional evidence from forthcoming research suggests that there are notable heterogeneities in both disclosure rates and the effects of the regulatory change on influencers of different sizes and in different “industries”. For example, larger influencers were disclosing more content prior to regulations and are less affected by the changes.

Further analysis shows that the ratio in engagement between undisclosed sponsored and organic content falls after regulations in Germany, moving to close to one in the treated period (i.e., one organic like for one undisclosed sponsored like). This suggests that, as predicted by the theoretical model, the disclosure of a subset of sponsored posts increases the beliefs of followers that the remaining posts are not sponsored, and so increases their engagement relative to organic posts. In the theory model, such an outcome would be interpreted as bad for consumers, who are in a sense “deceived” by the undisclosed content into liking it more than they would have if it was disclosed.

6 DISCUSSION

The three analytic theory models described above present distinct channels through which disclosure regulations may backfire, resulting in higher ad loads for many social media users, potentially more undisclosed sponsored content, and lower social media user well-being. All three of these can occur simultaneously. When regulations come in, influencers building their reputations may have an incentive to increase the amount of sponsored content they post due to concerns about the profitability of disclosed sponsored posts,³³ due to a change in the composition of their followers,³⁴ and due to the imperfection of regulations and to changes in their followers’ beliefs.³⁵ All of these effects may reinforce one another.

There are also additional effects and channels that are not considered in these studies. For example, the choice of business model by influencers, and how these choices would be affected by changing regulations, is an important channel for consumer well-being,³⁶ but it is not studied by any of the papers discussed above. The closest paper to studying this examines the interaction

³³ As in Mitchell (n 7).

³⁴ As in Fainmesser and Galeotti (n 7).

³⁵ As in Ershov and Mitchell (n 7).

³⁶ See Catalina Goanta, ‘Emerging Business Models and the Crowdfunding Regulation: Income Crowdfunding on Social Media by Content Creators’ (2021)

between influencers and brands, and the information embedded in advertising content by different types of influencers.³⁷

The empirical evidence presented in Ershov and Mitchell's paper³⁸ regarding the increasing ad load German Instagram users face after the tightening of disclosure regulations is also consistent with all three models presented above. They show the theoretical channel from their paper holds, but since they only have a small set of influencers and have no data on non-influencer users (e.g., followers), they are not able to test for the sorting of different followers across influencers and the re-allocation of followers after the regulatory regime is strengthened (as in Fainmesser and Galeotti's paper³⁹). Testing the predictions of Mitchell's paper⁴⁰ is also challenging since they relate to relatively complex dynamic incentives. That said, related work shows that the share of sponsored content that influencers post increases over their "lifetime" as the number of followers they have also increases.⁴¹ This confirms some of Mitchell's theoretical results regarding the cycle of influencer content posting.

There are several implications for regulatory design coming out of this stream of research. First, it is crucial for the regulatory environment to be as clear as possible to influencers with respect to what content needs to be disclosed and how this disclosure must take place. Put another way, disclosure regulations must be as "airtight" as possible, to avoid any attempts by influencers to game the regulations and post a large volume of sponsored content with the hope that some of it escapes disclosure requirements. As suggested by Mitchell's paper, there is also reason to suggest that disclosure regulations should be more lax for larger influencers, who are likely to disclose in any case. That environment, which would be stricter for smaller influencers, would encourage influencers to post more organic content over the course of their career. Moreover, more popular brands and influencers already have substantially higher inherent incentives to disclose their sponsored content compared with smaller brands and influencers, as they have established reputations to uphold.

It should be noted that it would be difficult for any regulatory agency to substantially increase the scrutiny of content produced by a large group of social media users without the cooperation and assistance of the social media

<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3885581> accessed 23 June 2024.

³⁷ Pei and Mayzlin (n 6).

³⁸ Ershov and Mitchell (n 7).

³⁹ Fainmesser and Galeotti (n 7).

⁴⁰ Mitchell (n 7).

⁴¹ Daniel Ershov and Matthew Mitchell, 'The Effects of Influencer Advertising Disclosure Regulations: Evidence From Instagram' (2020) Proceedings of the 21st ACM Conference on Economics and Computation (EC '20) 73.

platforms themselves. This, in turn, is unlikely to occur without additional regulatory intervention. In the US, for example, the main social media platforms bear no responsibility for the content that influencers post, including for any misleading or inappropriately labelled commercial content. In fact, given the current evidence that disclosed sponsored content is less engaging than undisclosed sponsored content (or organic content), it makes sense that platforms have little incentive to tackle it. Their goal, after all, is to maximise their own engagement and advertising revenues.

One potential avenue for future change is the implementation of the new Digital Services Act (DSA).⁴² The goals of this act explicitly include consumer protection and the minimisation of misleading commercial content. As part of the Act, the EU Commission will be given powers to access data from the main EU-operating platforms, including TikTok, Instagram and Facebook. With increased scrutiny and accountability, it may be possible to incentivise the platforms to seriously consider to better monitor disclosure of commercial content, with potential reductions in the amount of undisclosed sponsored content.

That said, it is important to consider the role and incentives of platforms in this market more carefully. Over time, the role of platforms in mediating the relationships between influencers and advertisers changed. In the early days of influencer marketing, platforms were essentially entirely uninvolved in commercial transactions, which were completed using third-party marketing agencies. However, in recent years, likely because of the growth of the influencer market, platforms have become increasingly involved as intermediaries, pushing influencers and advertisers to connect through them. This potentially has positive implications for disclosure, as discussed above. However, it may also generate additional effects – with the weakening of third-party marketing agencies, platforms may gain too much market power, resulting in adverse welfare consequences for influencers, marketers and social media users more generally.⁴³ More research on the role of platforms in influencer marketing is needed.

⁴² Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC [2022] OJ L 277 (Digital Services Act).

⁴³ One potential recent example of platforms exerting their power relates to their experiments with removing the number of likes posts receive from public view. These are allegedly done to improve users' mental health, but they also negatively affect third-party marketing agencies, who rely on scraping the platforms and using the number of likes for analytics. For more, see Paige Leskin, "Influencers are fighting for attention as Instagram tests removing likes from its platform: 'There's no audience applause at the end of a performance'" (*Business Insider*, 5 September 2019) <<https://www.businessinsider.com/instagram-influencers-removing-likes-impact-2019-9?r=US&IR=T>> accessed 23 June 2024.

6. To ban or not to ban?: Understanding the impact of platform discretion in content moderation on professional Twitch streamers

Laura Aade

1 INTRODUCTION

“I am the ultimate specimen of Twitch entertainment.” This bold declaration from the famous streamer Dr Disrespect, has been long emblematic of his confidence to mesmerise and attract viewers on the live-streaming platform. With his dynamic and engaging content, he has built up a sizeable following and secured a multi-year contract with Twitch, laying a solid foundation for a professional career in streaming. However, the trajectory of his career took an unexpected turn in June 2020, when Twitch decided to ban Dr Disrespect from the platform, without providing any explicit reasons.¹ This unilateral and abrupt decision has taken its toll on the gaming community, leaving fans and other content creators in a state of shock. Twitch, in response to queries surrounding this ban, issued a generic statement: “As is our process, we take appropriate action when we have evidence that a streamer has acted in violation of our Community Guidelines or Terms of Service. These apply to all streamers, regardless of status or prominence in the community.”² Dr Disrespect, refusing to accept the ban without a fight, filed a lawsuit seeking justice and clarification of this sudden expulsion. The legal saga unfolded

¹ J Kastrenakes, ‘Dr Disrespect is Gone and Twitch Won’t Say Why’ (*The Verge*, 26 June 2020) <<https://www.theverge.com/2020/6/26/21304907/dr-disrespect-twitch-ban-no-reason-given>> accessed 22 June 2024.

² S Hollister, ‘Dr Disrespect Breaks Silence, But Twitch Still Refuses to Say What’s Going On’ (*The Verge*, 27 June 2020) <<https://www.theverge.com/2020/6/28/21305822/twitch-dr-disrespect-alleged-ban-statement-guy-beahm>> accessed 22 June 2024.

over more than two years ago, culminating in a resolution that left both parties absolved of any wrongdoing.³

The situation involving Dr Disrespect serves as an example to highlight the discretionary power enjoyed by social media platforms in content moderation. Such power stems from the legal principle of contractual freedom, allowing online platforms to provide their digital services based on rules that they have drafted themselves: the so-called terms and conditions. This freedom of contract gave rise to the emergence of private governance frameworks, where social media platforms exercise enormous discretion in regulating user behaviours. The magnitude of this discretionary power can be better understood by examining how the terms and conditions are enforced by these platforms. The fact that their moderation activity is only partially connected to administrative procedures (e.g., judicial take-down orders) implies that they can remove content, ban users, and apply other forms of moderation at their own discretion. In this context, I define *platform discretion* as the power granted to and by online platforms to formulate and enforce the rules governing their contractual relationship with users.

The impact of platform discretion on users is undeniable, particularly on content creators who have successfully joined the monetisation programs offered by social media platforms. On Twitch, three monetisation programs are available to streamers: the Affiliate Program, the Partner Program, and the Partner Plus Program. Each of them enables streamers to generate revenue from various content monetisation strategies, such as advertising, subscriptions, or donations. The reliance of content creators on these programs for income and livelihood introduces a notable vulnerability in relation to platform discretion in content moderation. While becoming a Twitch Affiliate or Partner clearly offers streamers financial advantages on the platform, it also puts them at risk of sudden and unexplained bans. However, the exact harms arising from platform discretion in content moderation for professional content creators on Twitch remain highly unclear. In this chapter, I address this grey area of academic scrutiny by making three fundamental contributions to existing scholarship found at the intersection of law and media studies. First, I analyse how the agreement concluded between Twitch and its professional streamers can legally qualify as a work contract under French law. Second, I explore the contractual and legal framework that led to the development of platform discretion in content moderation. Third, I empirically describe and critically reflect on the types of harms that can arise from an abrupt and unilat-

³ A Chalk, 'Dr Disrespect Settles his Lawsuit with Twitch' (*PcGamer*, 10 March 2022) <<https://www.pcgamer.com/drdisrespect-settles-his-lawsuit-with-twitch/>> accessed 22 June 2024.

eral termination of affiliate or partnership relationships by Twitch, as a result of platform discretion in content moderation. The research question therefore analyses how platform discretion in content moderation can pose a threat to French streamers who earn (or used to earn) their living on the live-streaming platform.

2 TWITCH MONETISATION PROGRAMS: THE INTERPLAY BETWEEN PLAY AND WORK

Twitch is the largest live-streaming platform and has revolutionised the way individuals engage with online content. Established in 2011 as a development of *Justin.tv*, it started with a strong focus on gaming culture and electronic sports (eSports).⁴ Over time, the platform expanded its categories of content, spanning from ‘Food & Drinks’ to ‘Sciences & Technology’. Its monumental success is evident by its ranking as the 25th most visited website worldwide in 2023,⁵ and its acquisition by Amazon for \$1 billion in 2024.⁶ Beyond these numerical achievements, Twitch distinguishes itself through its practice of sharing advertising revenue, viewer subscriptions, and the sale of virtual goods (Bits) with some streamers.⁷ This monetisation strategy not only encourages content creators to professionalise their streaming activities, but also ensures regular content for consumers.⁸ However, the opportunity to earn revenue from streaming is exclusively accessible for content creators who are part of the Twitch Affiliate Program,⁹ the Partner Program¹⁰ or the recently introduced

⁴ M Johnson and J Woodcock, ‘“And Today’s Top Donator Is”: How Live Streamers on *Twitch.tv* Monetize and Gamify their Broadcasts’ (2019) 5(4) *Social Media + Society* 1, 2.

⁵ J Howarth, ‘Most Visited Websites in the World (November 2023)’ (*Exploding Topics*, 6 November 2023) <<https://explodingtopics.com/blog/most-visited-websites>> accessed 22 June 2024.

⁶ K Gittleson, ‘Amazon Buys Video-Game Streaming Site Twitch’ (*BBC*, 25 August 2014) <<https://www.bbc.com/news/technology-28930781>> accessed 22 June 2024.

⁷ M Sjöblom et al., ‘The Ingredients of Twitch Streaming: Affordances of Game Streams’ (2019) *Computers in Human Behavior* 20, 21.

⁸ M Törhönen, M Sjöblom and J Hamari, ‘Likes and Views: Investigating Internet Video Content Creators Perceptions of Popularity’ (*GaminFIN* 2018, Pori, May 2018) 108, 112.

⁹ Twitch, ‘Twitch Affiliate Program’ <<https://help.twitch.tv/s/article/joining-the-affiliate-program>> accessed 22 June 2024.

¹⁰ Twitch, ‘Twitch Partner Program’ <<https://www.twitch.tv/p/en/partners/>> accessed 22 June 2024.

Partner Plus Program.¹¹ Several initiatives and tools were created by the platform to help streamers qualify for these programs, such as the Creator Camp¹² providing training sessions with successful Partners or the Achievement Page to track progress towards meeting the necessary requirements.¹³ While each program has distinct selection criteria, Twitch tends to select streamers who demonstrate consistency, and most importantly, have succeeded in creating their own community.¹⁴ This focus stems from the fact that the main source of income for professional streamers comes from donations, subscriptions, and Bits.¹⁵ To encourage viewers in engaging with revenue affordances (e.g., subscription button), professional streamers should therefore build up their fanbase, maintain parasocial relationships, and foster a sense of community among their audience.¹⁶ This not only enables streamers to boost their earnings, but also benefits Twitch, who claims a 30–50% share of net subscription revenues, depending on the program streamers are enrolled in.¹⁷

By allowing streamers to turn their passion into a remunerated job, these monetisation programs have blurred the traditional boundaries between play and work.¹⁸ This shift has led to the development of a ‘hybrid worker’, one

¹¹ Twitch, ‘The Partner Plus Program is Live!’ (2 October 2023) <<https://blog.twitch.tv/en/2023/10/02/update-to-the-partner-plus-program/>> accessed 22 June 2024.

¹² Twitch, ‘Creator Camp’ <<https://www.twitch.tv/creatorcamp/>> accessed 22 June 2024.

¹³ Twitch, ‘Achievements Page’ <<https://help.twitch.tv/s/article/achievements>> accessed 22 June 2024.

¹⁴ M Cocq, ‘Constitution et exploitation du capital communautaire: Le travail des streamers sur la plateforme Twitch.nrt’ (2018) 18 *La nouvelle revue du travail* 1, 8.

¹⁵ A Houssard et al, ‘Monetisation in Online Streaming Platforms: An Exploration of Inequalities in Twitch.tv’ (2023) 13(1) *Scientific Reports* 1103, 1104.

¹⁶ J Woodcock and J Johnson, ‘The Affective Labor and Performance of Live Streaming on Twitch.tv’ (2019) 20(8) *Television & New Media* 813, 819; M Johnson and J Woodcock, ‘“It’s Like the Gold Rush”: The Lives and Careers of Professional Video Game Streamers on Twitch.tv’ (2019) 22(3) *Information, Communication & Society* 336, 342; N Baym, *Playing the Crowd: Musicians, Audiences, and the Intimate Work of Connection* (New York University Press 2018) 21.

¹⁷ Twitch, ‘The Partner Plus Program is Live!’ (2 October 2023) <<https://blog.twitch.tv/en/2023/10/02/update-to-the-partner-plus-program/>> accessed 22 June 2024.

¹⁸ Johnson and Woodcock, ‘“It’s Like the Gold Rush”: The Lives and Careers of Professional Video Game Streamers on Twitch.tv’ (n 16) at 340.

who converted their leisure activities into professional careers.¹⁹ In the past, user-generated content was seen as a form of uncompensated labour, primarily because users did not perceive their contributions as work or did not fully grasp their financial value to the hosting platforms.²⁰ However, the introduction of these programs has catalysed the transition from user-generated content, which once served as a means to express creativity, to professionally user-generated content.²¹ This transition is particularly evident in the context of Twitch, where many users have embarked on a journey towards establishing themselves as professional brands. A notable example is the success story of the Swedish content creator PewDiePie, who has emerged as an entrepreneurial figure in the gaming industry. In addition to his substantial number of subscribers on Twitch, he has actively contributed to four gaming titles, written a parody book, and co-owns a unisex clothing line.²² Although similar monetisation programs already existed on other platforms, such as YouTube, Twitch has rendered the attainment of tangible rewards more accessible for streamers by incorporating gamified elements and achievements.²³ The live-streaming platform does not hide the remunerated labour of its professional streamers: rather, it highlights it through the introduction of monetization features and increased revenue opportunities.²⁴ Twitch monetisation programs are therefore actively shaping the digital economy, aligning with the concepts of ‘playbour’²⁵ and digital labour.²⁶

The agreement concluded between streamers who have successfully joined one of the monetization programs and Twitch can qualify as a work contract

¹⁹ Sjöblom et al. (n 7).

²⁰ R Caplan and T Gillespie, ‘Tiered Governance and Demonetisation: The Shifting Terms of Labor and Compensation in the Platform Economy’ (2020) 6(2) *Social Media + Society* 1, 3.

²¹ J Kim, ‘The Institutionalization of YouTube: From User-Generated Content to Professionally Generated Content’ (2012) 34(1) *Media, Culture & Society* 53, 58.

²² A Singh, ‘5 Popular Streamers Who have Built a Successful Business Empire’ (*Sportskeeda* 24 April 2023) <<https://www.sportskeeda.com/esports/5-popular-streamers-built-successful-business-empire>> accessed 22 June 2024.

²³ Sjöblom et al. (n 7) at 20, 21.

²⁴ Johnson and Woodcock (n 4) at 3.

²⁵ M Törhönen, ‘Play, Playbour or Labour? The Relationships between Perception of Occupational Activity and Outcomes among Streamers and YouTubers’ (Proceedings of the 52nd Hawaii International Conference on System Sciences, 2019) 2559.

²⁶ T Scholz, *Digital Labor: The Internet as Playground and Factory* (Routledge 2012) 1.

under French law. As established by the *Cour de Cassation*, three key elements must be present for an agreement to be considered as such: a provision of service, remuneration element, and subordination link. In this way, a work contract is understood as an agreement by which an individual undertakes to make their services available to another under the latter's authority, in return for remuneration. The existence of such a contract between Twitch and its professional streamers therefore depends on whether these criteria are fulfilled.²⁷ Professional streamers fulfil their contractual obligations – arising from agreements with advertisers, sponsors or Twitch itself – through the platform. The latter therefore serves as their digital workplace to conduct streaming activities,²⁸ similar to a traditional employment setting providing employees with the necessary space and tools to perform their tasks. Additionally, the introduction of different monetisation programs, each offering unique benefits and income potential, drives content creators to perform at their best. Just as employees strive for promotion by excelling in their roles, streamers are motivated to maintain and expand their channels in order to access higher-tier programs and associated financial rewards.²⁹ Another resemblance to an employment relationship is that not every streamer can generate revenue from their activities due to the selection procedure for entering monetisation programs. This process mirrors the conventional method of recruiting individuals for employment, akin to the screening and selection used by employers to find qualified candidates for their workforce. After being selected, Twitch's metrics assess the performance of streamers and play a crucial role in determining future contracts, much like an employer evaluating the work of employees.³⁰ The platform therefore has the authority to shape the future of its professional streamers and assess whether their profile remains in line with the program they are enrolled in.

Going back to the French legal test, first, there is a provision of service in the sense that streamers actively create content on the platform to attract viewers and engage with audiences. Their streaming activities highly contribute to the

²⁷ Ass. Plén. 4 mars 1983; Cass. Soc. 4 avril 2012 n°18.28.818 à 18.28.830.

²⁸ V Richter and Z Ye, 'Influencers' Instagram Imaginaries as a Global Phenomenon: Negotiating Precarious Interdependencies on Followers, the Platform Environment, and Commercial Expectations' (2023) 0(0) *Convergence* 1, 9.

²⁹ M Johnson, M Carrigan and T Brock, 'The Imperative to Be Seen: The Moral Economy of Celebrity Video Game Streaming on *Twitch.tv*' (2019) 24(8) *First Monday* 1, 3.

³⁰ V O'Meara, 'Weapons of the Chic: *Instagram* Influencer Engagement Pods as Practices of Resistance to *Instagram* Platform Labor' (2019) 5(4) *Social Media + Society* 1, 4.

success of Twitch which, in turn, generates revenue through various content monetization strategies. However, it should be mentioned that professional content creators are not typical workers due to the level of freedom, creativity, and autonomy they enjoy. Streamers are not bound by fixed working hours or location, allowing them to work from the comfort of their own home and choose the activities or games they want to broadcast.³¹ Content creators are typical examples of so-called neoliberal worker subjects, characterised by their entrepreneurial spirit, flexibility, and self-direction.³² However, this freedom also brings with it a sense of precarity, defined by de Peuter as the “existential financial, and social insecurity exacerbated by the flexibilisation of labour markets”.³³ Professional streamers invest time, resources, and energy into building their channels with no guarantee of success or financial stability. This precarity is common in the gig economy, where content creators frequently lack the job security and benefits associated with traditional employment.³⁴ Second, the remuneration element is central to the relationship between Twitch and its professional streamers: joining one of the monetization programs provided by the platform is largely based on the desire to earn revenue from streaming activities. Lastly, the subordination link is evident in the dynamic between the live-streaming platform and its professional content creators. While the latter enjoy a degree of autonomy and freedom, they are subject to a number of rules and conditions set forth by Twitch, ranging from acceptable content to copyright policies. This subordination increases the uncertainty surrounding the work of professional streamers, as the platform holds significant control over the reach and overall success of content creators.³⁵ While streamers are the primary attraction for viewers, they have limited influence over their algorithmic visibility and the platform’s decision-making processes.³⁶ This subordination link is particularly obvious in content moderation, where social media platforms enjoy a wide discretionary power.

³¹ Richter and Ye (n 28) at 11; Z Glatt, ‘We’re All Told Not to Put Our Eggs in One Basket: Uncertainty, Precarity and Cross-Platform Labor in the Online Video Influencer Industry’ (2022) 16 *International Journal of Communication* 3853, 3857.

³² R Gill and A Pratt, ‘In the Social Factory? Immaterial Labor, Precariousness and Cultural Work’ (2008) 25(7–8) *Theory, Culture & Society* 1, 20.

³³ G de Peuter, ‘Creative Economy and Labor Precarity: A Contested Convergence’ (2011) 35 *Journal of Communication Inquiry* 417, 418.

³⁴ Glatt (n 31) at 3861.

³⁵ C Are and P Briggs, ‘The Emotional and Financial Impact of De-Platforming on Creators at the Margins’ (2023) *Social Media & Society* 1, 4.

³⁶ S Bishop, ‘Managing Visibility on YouTube Through Algorithmic Gossip’ (2019) 21(11–12) *New Media & Society* 2589, 2591.

3 THEORISING PLATFORM DISCRETION IN CONTENT MODERATION

Although Twitch allows content creators to generate revenue from their streaming activities, it is also prone to disruptive content and behaviours. For that reason, it must engage in content moderation, defined by Gillespie et al. as the “detection of, assessment of, and interventions taken on content or behaviour deemed unacceptable by platforms and other information intermediaries, including the rules they impose, human labour and technologies required, and the institutional mechanisms of adjudication, enforcement, and appeal that support it”.³⁷ To conduct this complex task, Twitch established its own set of rules regulating the flow of information and the behaviour of its users, leading to the emergence of private governance.³⁸ These rules, which are of a contractual nature, are made available through two main documents: the terms of service and the community guidelines. While the former defines the conditions under which Twitch and its users interact, the latter specifies the categories of content and behaviour that are prohibited on the platform.³⁹ As this research focuses on professional streamers, the Twitch Monetized Streamer Agreement is another important document which provides additional terms and conditions applicable to monetisation programs.⁴⁰ One might believe that the purpose of these rules is to safeguard content creators from the precarity and uncertainty they face on a constant basis. However, a closer look at these contractual rules reveals significant power imbalances between Twitch and its users and cannot be said to represent the interests of professional streamers above content moderation norms. By using persuasive language and relying on borrowed values, they explicitly empower Twitch with the authority to remove content or suspend an account, for any reason, at its own discretion. For instance, the Twitch Monetized Streamer Agreement explicitly states that the platform

³⁷ T Gillespie et al, ‘Expanding the Debate About Content Moderation: Scholarly Research Agendas for the Coming Policy Debates’ (2020) 9(4) Internet Policy Review 1, 2.

³⁸ J Balkin, ‘Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School of Speech Regulation’ (2017) UC David Law Review 1151, 1182.

³⁹ T Gillespie, *Custodians of the Internet: Platforms, Content Moderation, and the Hidden Decisions that Shape Social Media* (Yale University Press 2018) 46; S West, ‘Censored, Suspended, Shadowbanned: User Interpretations of Content Moderation on Social Media’ (2018) 20(11) New Media & Society 4366, 4369.

⁴⁰ Twitch, ‘Twitch Monetized Streamer Agreement’ <<https://www.twitch.tv/p/en/legal/monetized-streamer-agreement/>> accessed 22 June 2024.

can suspend or terminate an agreement “in its sole and absolute discretion” if a streamer allegedly infringes its rules.

To understand the extent to which Twitch enjoys discretionary power in content moderation, it is necessary to describe the legal and contractual regime that allowed for the development of such power. The reason why platforms find themselves arbitrating tastes and interpreting self-regulatory rules is closely linked to the principle of ‘freedom of contract’. Rooted in the liberal politics of *laissez-faire*, it asserts that individuals should have the freedom to determine their own contractual terms within the limits of mandatory law.⁴¹ It assumes that parties are best equipped to establish what is in their own best interests and are best positioned to conclude the contract they desire.⁴² In the context of Twitch, it means that whenever it is offering access to its digital services, it can do so according to the rules that it has drafted itself. The broad discretion enjoyed by social media platforms is further accentuated by their reliance on standard contracts, which have not been subject to prior negotiation between the contractual parties.⁴³ These contracts are, in turn, presented to users on a take-it-or-leave-it option, leaving users no room to object to specific terms and considerably increasing the platform’s discretionary control.⁴⁴ In this chapter, I empirically explore the harms arising from platform discretion in content moderation on Twitch professional streamers who have been banned from the platform and used to generate revenue from their online activities. I define *platform discretion* as the power granted to and by online platforms to formulate and enforce rules that govern the contractual relationship between the platform and its users.

4 METHOD AND ANALYSIS

I conducted ten semi-structured interviews with Twitch streamers to discuss their experiences with platform discretion in content moderation. All interviewees were professional content creators, with two Affiliates and eight Partners, earning revenue from their streaming activities. The majority rely (or

⁴¹ J Smits, *Contract Law: A Comparative Introduction* (Edward Elgar 2014) 10.

⁴² E McKendrick, *Contract Law: Text, Cases, and Materials* (Oxford University Press 2005) 13.

⁴³ M Perel, N Elkin-Koren and G De Gregorio, ‘Social Media as Contractual Networks: A Bottom-Up Check on Content Moderation’ (2021) 107 Iowa Law Review 987, 1027.

⁴⁴ F Borgesius et al, ‘Tracking Walls, Take-It-Or-Leave-It Choices, the GDPR, and the ePrivacy Regulation’ (2017) European Data Protection Law Review 353, 353.

used to rely) on streaming as their full-time profession and others use it as an additional source of income, with the hope of one day completely transitioning their passion into a career. Interviewees had channels of different sizes, ranging from a small number of followers (between 50 and 5,000) to a higher number (above 50,000). Only streamers that were banned from Twitch for allegedly violating the terms of service, or any other rules, were selected: while some experienced a 24-hour ban, others were permanently banned and still do not have access to their account. Interviewees were recruited based on the dashboard of the Twitch Partner Bot ‘Streamer Bans’, which maintains a record of every banned streamer with their name and the duration of the ban.⁴⁵ They were then contacted via their X account (previously Twitter), and a snowball method was used to establish contact with additional streamers based on recommendations from other interviewees.⁴⁶ The geographic scope of the sample was limited to France, and all interviews were carried out in French on Microsoft Teams or Zoom. After conducting ten interviews, each lasting approximately one hour, a point of saturation was reached as no new themes or patterns emerged from the collected data. Although streamers addressed diverse elements of their experiences with platform discretion, the observed harms were remarkably consistent across the participants. Interviews were recorded, manually transcribed, coded, and analysed using an inductive research process to create a comprehensive overview of the themes emerging from the data. These semi-structured interviews provided insights into the harms that streamers encountered following an abrupt and unilateral termination of their affiliate or partnership relationships with Twitch. Two categories of harms arising from platform discretion in content moderation were identified: material harms and immaterial harms. Each of these categories is discussed more extensively in the following sub-sections.

4.1 Material Harms Arising from Platform Discretion

4.1.1 Financial instability and economic loss

The primary material harm arising from platform discretion in content moderation was the financial loss suffered by streamers after the termination of their affiliate or partnership agreement with Twitch. Interviewees have unanimously reported that the suspension of their account had a tangible economic impact on their lives: Twitch served as their workplace where they could

⁴⁵ Streamer Bans, ‘Dashboard’ <<https://streamerbans.com/>> accessed 22 June 2024.

⁴⁶ D Mertens, *Transformative Research and Evaluation* (Guilford Press 2009) 215.

generate revenue from their streaming activities. While banned streamers lose the possibility to stream on the platform, they are also deprived from the income generated through the various monetisation methods. However, the exact amount of this loss is difficult to determine as it largely depends on the number of subscribers, donations, and sponsorships received by streamers. According to the interviewees, their monthly salary typically ranges from €100 for Affiliates with 10 viewers to €10,000 for Partners with 3,000 viewers. Suspending an account not only affects the streamers and viewers who subscribed to their favourite channels but also impacts Twitch itself, as it receives a portion of the money generated through these monetisation programs. While most interviewees used to share 50% of their revenue with the platform, others have negotiated a more favourable rate securing 70% of their earnings. It is important to note that, according to Twitch, the latter rate is only accessible to streamers enrolled in their Partner Plus Program, which, at the time of the interviews, had not yet been launched.⁴⁷ This variation in revenue-sharing on Twitch aligns with the concept of tiered governance, introduced by Caplan and Gillespie, whereas YouTube offers different sets of rules and treatments to its users.⁴⁸

The financial loss resulting from platform discretion is heightened as content creators are not eligible for social protection schemes and do not have access to unemployment benefits if their account is suspended. Professional content creators are merely hosted by online platforms and, therefore, do not benefit from the labour rights afforded to traditional employees.⁴⁹ As noted by several interviewees, the absence of safeguards is a major flaw in the system, particularly for streamers facing unpredictable working hours and economic uncertainty. As expressed by one interviewee:

When you are a content creator, your livelihood is at the mercy of Twitch. If it decides to ban you: it is an economic apocalypse, a complete wipeout. Streaming is not just my passion; it is my job and my financial heartbeat. And to top it off, even the government is grabbing its share through taxes – leaving us gasping for breath to survive when our account is suspended for pronouncing a forbidden word according to Twitch rules. (Respondent E).

⁴⁷ Twitch, 'The Partner Plus Program is Live!' (2 October 2023) <<https://blog.twitch.tv/en/2023/10/02/update-to-the-partner-plus-program/>> accessed 22 June 2024.

⁴⁸ Caplan and Gillespie (n 20) at 2.

⁴⁹ O'Meara (n 30) at 4.

4.1.2 Content exclusivity clauses and streaming restrictions

The pecuniary loss reported by banned streamers is inherently linked to another material harm arising from platform discretion: the prohibition to stream on a different platform. Seven interviewees, all of whom were Twitch Partners, highlighted that the platform's discretionary power is so extensive that it can prevent them from streaming elsewhere – even if their account has been suspended. This prohibition is rooted in the content exclusivity clauses found in the affiliate and partnership agreements, as stated by one interviewee. Exclusivity clauses play a pivotal role in live entertainment on social media: the interest of Twitch viewers lies in their ability to establish direct and privileged connections with streamers.⁵⁰ Nevertheless, one interviewee felt that Twitch may be abusing its dominant position in the live-streaming industry by preventing its content creators from broadcasting on other platforms. He also reported that the moderation staff threatened him, stating that the tiny possibility of getting his account back would disappear if he streamed on his YouTube channel, although his account was permanently banned at the time (Respondent G). Another interviewee, who found himself in the same situation, had to wait almost two months for Twitch to confirm the end of their partnership agreement before he could stream on another platform. These exclusivity clauses go against the adage of “not putting all our eggs in one basket”, encouraging content creators to diversify their work and income across various platforms to establish sustainable professional careers.⁵¹

Interestingly, two interviewees admitted that even if they were allowed to broadcast on a different platform, such as YouTube, the financial loss caused by Twitch's unilateral decision to suspend their account would not be fully compensated. As noted by one of them, while viewership numbers on YouTube might be higher, the revenue is considerably lower compared with Twitch – sometimes up to ten times less. Such findings can be explained by the fact that the YouTube community is less prone to rewarding streamers with donations or engaging in community-building compared with Twitch viewers.⁵² The live-streaming platform has successfully cultivated an environment with gamified elements and monetisation schemes, which stimulate viewers to con-

⁵⁰ J Woodcock and M Johnson, ‘Live Streamers on Twitch.tv as Social Media Influencers: Chances and Challenges for Strategic Communication’ (2019) 13(4) *International Journal of Strategic Communication* 312, 333; T Taylor, *Watch Me Play: Twitch and the Rise of Game Live Streaming* (Princeton University Press 2019) 75.

⁵¹ Glatt (n 31) at 3860.

⁵² Sjöblom et al. (n 7) at 21.

sistently support their favourite streamer.⁵³ Additionally, the focus of Twitch on the gaming culture makes it more likely to attract viewers who are highly comfortable engaging with revenue affordances.⁵⁴ Another factor to take into account, as mentioned by one interviewee, is the difficulty of transferring an audience from one platform to another – suggesting that a permanent ban is a major setback for streamers who have built up their entire fanbase on Twitch. Nevertheless, five interviewees took this prohibition to stream on another platform as an opportunity to relax and take a break from the streaming industry. It should be mentioned that Twitch has recently removed these content exclusivity clauses from its affiliate and partnership agreements, which was not the case yet at the time the interviews were conducted (Respondent E).

4.1.3 Subscription drops, shadow-banning consequences, and reputational impact

Along with the financial loss and the prohibition to stream on other platforms, platform discretion has caused another harm to those interviewed: a decline in their number of subscribers. Most interviewees reported that the suspension of their account had a long-term impact on their reputation. It affected their ability to reach their audience and to maintain the subscriber community they had built on the platform prior to being banned. One interviewee revealed that his number of subscribers dropped from 1,600 to 300 after Twitch suspended his account twice for allegedly violating its community guidelines (Respondent B). Another suspected that the platform shadow banned him after getting his account back, as viewers were no longer receiving notifications when he was streaming, and his broadcasts kept on cutting out for no reason (Respondent I). Shadow banning – defined as a content moderation sanction involving delisting and downranking⁵⁵ – is a common practice in the social media ecosystem and has received sustained attention in the existing literature for its adverse impact on content creators.⁵⁶ To counter this material harm caused by platform discretion in content moderation, most interviewees have released a YouTube video explaining the reasons behind their account suspension and expressing their views as to whether the ban was justified. They

⁵³ Ibid.

⁵⁴ Johnson and Woodcock (n 4) at 9.

⁵⁵ P Leerssen, 'An End to Shadow Banning? Transparency Rights in the Digital Services Act Between Content Moderation and Curation' (2023) 48 *Computer Law & Security Review* 1, 2.

⁵⁶ K Cotter, 'Shadow Banning is Not a Thing: Black Box Gaslighting and the Power to Independently Know and Credibly Critique Algorithms' (2020) 26(3) *Information, Communication & Society* 1226, 1233; Glatt (n 31) at 3863.

confessed that this type of content serves as a means to communicate with their audience, and to ensure that viewers will return to their channels once their account is no longer suspended.

Despite experiencing a decrease in their subscriber counts, six interviewees reported feeling warmly welcomed by their audience upon their return to the platform. Some attributed this support to their YouTube video discussing their bans, while others explained it by the fact that people were aware that they could not work for some time and wanted to make up for it. Streamers were paying particular attention to expressing their gratitude to donors by mentioning their names, a common practice in the live-streaming industry. In fact, viewers are typically attracted to channels where they feel recognised and influential, a sentiment that can foster engagement and financial support for the streamer.⁵⁷ Whatever the reason, the majority of interviewees stated that the pecuniary loss resulting from platform discretion was offset by the generosity of their audience the following month. As explained by one streamer:

Most folks do not juggle a hundred streamers, but rather stick to four or five streamers that they truly like. Like a well-kept secret, they understand that financially supporting your content is the only way to make sure that it does not fade away (Respondent I).

4.2 Immaterial Harms Arising from Platform Discretion

4.2.1 Psychological impact and cyber-bullying

The emotional distress caused by platform discretion in content moderation was the primary immaterial harm mentioned by interviewees. All of them recognised that the decision of Twitch to suspend their account, at its own discretion, caused them a great deal of stress, anger, and sadness. The strongest reactions came from two Twitch Partners who were permanently banned, which is the most severe form of moderation on social media. In line with the concept of tiered governance,⁵⁸ the platform treated these two streamers differently, as one was unable to appeal the suspension of his account for six months while the other had immediate access to the appeal procedure. Both interviewees have confessed to feeling extreme financial stress as, due to their partnership agreement with Twitch, they could not stream on any other platform. They also expressed a sense of anger towards the live-streaming

⁵⁷ D Gros et al, 'World of Streaming. Motivation and Gratification on Twitch' in G Meiselwitz (ed), *Social Computing and Social Media: Human Behavior* (Springer 2007) 47; W Patin, 'Watch Me Pay: Twitch and the Cultural Economy of Surveillance' (2019) 17(1–2) Platform Surveillance 1,

⁵⁸ Caplan and Gillespie (n 20) at 2.

platform for not hesitating to suspend their accounts, although they were generating revenues for it. Another interviewee compared the discretionary power enjoyed by Twitch over its streamers to the right of life and death, a source of fear that often keeps him awake at night (Respondent E). Platform discretion in content moderation is therefore another factor increasing the uncertainty and precariousness of their work described in existing literature.⁵⁹ As declared by one interviewee:

Twitch has limitless and absolute power over us, which is a terrifying feeling. It is a chilling authority where a single click can shatter livelihoods and dreams – and I consider this situation as a form of modern slavery (Respondent E).

Having their account suspended is undeniably a stressful and terrifying experience for professional streamers, and it brings with it an additional burden: the judgement of others. After their account was banned for alleged harassment, the three interviewees with the largest audience found themselves subjected to attacks and insults. Regardless of whether their ban was justified or not, they were labelled as stalkers by the public at large, which was, according to them, extremely difficult to handle mentally speaking. One of them, who previously had a good relationship with Twitch France, noted that the platform was well aware he was not a harasser, but overlooked the fact that there was a real person behind the screen (Respondent B). Luckily, interviewees were strong enough to overcome these attacks, but this might not be the case for all streamers on the platform. As one interviewee testified:

Maybe one day, someone will take these insults personally and could find themselves in a tragic situation. I know several streamers who are emotionally vulnerable, and banning them from Twitch could be extremely dangerous. They put their heart and soul into their channels, and having their accounts suspended overnight is far from easy (Respondent I).

4.2.2 Loss of spontaneity, self-restraint, and censorship struggles

Following the emotional distress caused by platform discretion, the majority of interviewees embarked on a quest to find strategies that will shield them from being banned in the future. They unanimously agreed that the most effective approach is self-censorship, as the platform, according to one interviewee, has evolved into a “dictatorship where you cannot say anything”. Banning stream-

⁵⁹ D Hesmondhalgh and S Baker, ‘A Very Complicated Version of Freedom: Conditions and Experiences of Creative Labor in Three Cultural Industries’ (2010) 38(1) *Poetics* 4, 13; B Duffy, A Pinch and M Sawey, ‘The Nested Precarities of Creative Labor on Social Media’ (2021) 7(2) *Social Media + Society* 1, 4.

ers without a valid ground not only interferes with their freedom of expression, as discussed in the literature,⁶⁰ but also disrupts future speech and opinions. Interviewees have reported that the fear of a permanent ban impacted the way they spoke and behaved, either to comply with the platform's rules or in response to a breach of the community guidelines. This behaviour supports the argument that punitive measures by social media platforms, such as suspending an account, carry the risk of suppressing or chilling important discourse.⁶¹ After experiencing two account suspensions for hate speech, one interviewee decided to place Post-It notes with offensive words around his computer screen to ensure that he would not use them while streaming. Another interviewee shared:

I have memorised the list of banned words to the point where I cannot even pronounce them anymore in the offline world, outside of Twitch. These words are completely removed from my mind, and they cannot come out of my mouth, otherwise, I risk losing everything (Respondent G).

The fear of facing a ban not only results in self-censorship, but also robs professional streamers of their spontaneity, authenticity, and sincerity. According to four interviewees specialised in eSports, the initial purpose of Twitch was to offer a platform for authentic gaming competitions with viewers actively seeking authenticity and streamers sharing emotional reactions without any filters. They all agreed that the acquisition of Twitch by Amazon has fundamentally altered the platform's identity on which they used to feel independent and free. Even the streamers who served as role models for some interviewees and inspired them to pursue streaming as a career have completely changed to comply with the standards established by the platform. In other words, the discretionary power enjoyed by Twitch in content moderation prevents streamers from providing 'underground' content and indirectly forces them to clean up their image. Such a finding is not surprising, as, with the rise of monetisation methods such as sponsorships, one is no longer an autonomous actor on Twitch

⁶⁰ B Sander, 'Freedom of Expression in the Age of Online Platforms: The Promise and Pitfalls of a Human-Rights Based Approach to Content Moderation' (2019) 43 *Fordham International Law Journal* 939, 956; G De Gregorio, 'Democratising Online Content Moderation: A Constitutional Framework' (2020) 36 *Computer Law & Security Review* 1, 4.

⁶¹ E Armijo, 'Reasonableness as Censorship: Section 230 Reform, Content Moderation, and the First Amendment' (2021) 73(6) *Florida Law Review* 1199, 1217; J Balkin, 'Old-School/New-School Speech Regulation' (2014) 127(8) *Harvard Law Review* 2296, 2341.

but becomes bound by the expectations of corporate entities.⁶² By serving as an intermediary between brands and streamers, the live-streaming platform must therefore fulfil its role as a moderator to guarantee that its environment is fit for commercial interests. One interviewee commented:

I am aware that my personality has changed since I started making money on Twitch. I am fully aware that, in order to boost my monthly earnings, I make the conscious effort of maintaining a positive image to keep my current sponsors and to attract new brands (Respondent A).

4.2.3 Cultural crossroads: Americanisation and the clash of values

The last, but certainly not least, consequence of platform discretion in content moderation is what some interviewees refer to as the ‘Americanisation’ of streamers. Three interviewees, who were familiar with Twitch prior to its acquisition by Amazon, declared that the self-regulatory measures adopted by Twitch are largely based on American culture. According to them, Twitch regulates user-generated content in line with American values, corporate responsibility, and the economic need to create an environment that aligns with content monetisation. They believe that the live-streaming platform has deliberately hired lawyers who were trained in the American legal system, and whose thinking has been influenced by this legal jurisdiction. This lack of diversity behind social media platforms is a concern that has been discussed in existing literature: content moderation rules created by a small group with a particular view may not effectively consider diverse experiences, cultures, or value systems.⁶³ Even those responsible for drafting content policies for social media platforms have openly acknowledged their American cultural biases.⁶⁴ As a result, some interviewees expressed the feeling of being forced to ‘Americanise’ themselves in order to please the live-streaming platform and to avoid another account ban. One interviewee stated:

If we want to continue our career as professional streamers on Twitch, we are pushed to embrace American culture, or even to become American. It is a challenging task, considering that French values and norms can significantly differ from the American ones (Respondent B).

At the same time, as two interviewees pointed out, attempting to apply American norms and standards in a global company, such as Twitch, might

⁶² Johnson and Woodcock (n 4) at 6.

⁶³ West (n 39) at 4370; Gillespie (n 39) at 201.

⁶⁴ K Klonick, ‘The New Governors: The People, Rules, and Processes Governing Online Speech’ 2018 131(6) Harvard Law Review 1598, 1642.

give rise to complex legal consequences. As expressed by one of them, “if I am talking about a specific topic that is not violating any French rules, but does in the United States, the latter will prevail no matter what” (Respondent I). This statement relates to concerns previously raised by scholars about the incentive for social media platforms to excessively delete lawful content during their moderation processes.⁶⁵ However, the cautionary approach adopted by Twitch is not surprising: the platform, hosting a vast amount of content daily, must react rapidly upon any sign of questionable material, rather than engage in the time-consuming balancing act with the fundamental rights of streamers. It should be mentioned that the deletion of lawful content by Twitch and other social media platforms is likely to increase in light of the *Glawischnig* case, a landmark judgment issued by the Court of Justice of the European Union (CJEU).⁶⁶ In this decision, the CJEU paved the way for Member States to issue global content takedowns for content deemed unlawful, including any identical or similar content, even in jurisdictions where the material at stake would comply with national legislation.⁶⁷

5 CONCLUSION

This chapter analysed how platform discretion in content moderation can pose a threat to Twitch streamers who earn (or used to earn) their living on the live-streaming platform. I first examined whether the dynamic between Twitch and its content creators, who are part of a monetisation programme, can be compared with an employment relationship. While certain parallels with traditional employment were identified, there are some crucial nuances which, in turn, leave professional streamers inadequately protected. The monetisation programs offered by Twitch allow content creators to generate revenue from their streaming activities, to conclude agreements with brands, and to receive financial support from their audience. However, the precarity and uncertainty inherent in the gig economy are exacerbated by the need for social media platforms to engage in content moderation at their own discretion.

Striking a balance between content moderation and the financial opportunities provided by Twitch monetisation programs, such as the Affiliate Program or Partner Program, is a challenging task. While legal obligations and commer-

⁶⁵ Sander (n 60) at 950; D Keller, ‘Internet Platforms: Observations on Speech, Danger, and Money’ (2018) No. 1807 Hoover Institution’s Aegis Paper Series 1, 18.

⁶⁶ Case C-18/18 *Eva Glawischnig-Piesczek v Facebook Ireland Limited* [2019] ECLI:EU:C:2019:821.

⁶⁷ *Ibid*, para 37.

cial incentives require social media platforms to moderate content, the affiliate or partnership agreements concluded between the platform and some streamers add another layer of complexity. This balancing exercise is entirely left to the discretion of social media platforms, due to the contractual freedom they enjoy and their reliance on standard contracts, as explained in this chapter. However, platform discretion comes at a cost, particularly for professional streamers who depend on these monetisation programmes for their revenue. Drawing on data gathered from ten semi-structured interviews, I presented the material and immaterial harms that arose from an abrupt and unilateral termination of affiliate or partnership agreements by Twitch at its own discretion. Economic loss, being forbidden to stream on another platform as well as reputational damage were identified as the material harms arising from platform discretion. As for the immaterial harms, the psychological impact, self-censorship, and the so-called Americanisation of streamers highlight the broader implications of platform discretion in content moderation.

As we navigate the evolving landscape of social media platforms, it becomes essential to cultivate an environment where professional content creators can thrive, while complying with their own legal obligations. A fundamental step in achieving this goal is the legal recognition of content creators like Twitch Partners and Affiliates as workers or employees of the platform, ensuring their access to unemployment schemes and other benefits in the event of account suspension. The recently adopted French Influencer Law could have been the perfect opportunity to do so.⁶⁸ In addition to clarifying and adding new obligations for influencers, it also allegedly aimed at enhancing their protection by shedding light on the legal framework surrounding their activity.⁶⁹ While it tackled the relationship between influencers and their agents, it overlooked a critical aspect: the relationship between professional content creators, such as Twitch Affiliates or Partners, and social media platforms. This omission leaves them completely unprotected, reduces their chances of prevailing in a lawsuit if they wish to challenge the decision of the platform to ban their account, and fosters an environment where platform discretion is only likely to escalate.

⁶⁸ Loi no. 2023-451 du 9 juin 2023 visant à encadrer l'influence commerciale et à lutter contre les dérives des influenceurs sur les réseaux sociaux <<https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000047663185>> accessed 22 June 2024.

⁶⁹ Assemblée Nationale, 'Travaux parlementaires: lutte contre les arnaques et les dérives des influenceurs sur les réseaux sociaux' <https://www.assemblee-nationale.fr/dyn/16/dossiers/influenceurs_derives_reseaux?etape=16-AN1> accessed 22 June 2024.

7. Entrepreneurialism, precarity and self-governance: Examining cross-platform creator labour across Chinese and US-based social media economies

Ziying Meng

1 INTRODUCTION

The Chinese term “*wanghong*”, literally meaning internet red, refers to a group of creators, micro-celebrities and influencers who can convert online fame into commercial opportunities, and an emerging media ecology that has been built on Chinese social media and e-commerce services since the mid-2010s.¹ The Chinese *wanghong* industry appears to be a parallel universe to social media entertainment in the West, yet there is also the rise of “global *wanghong*”,² international creators whose content is distributed across Chinese and US-based platforms. This chapter examines content creators’ cross-platform labour as it aggregates across multiple Chinese and US-based social media platforms, including TikTok, Douyin and ByteDance’s ecosystem, bilibili, Sina Weibo, Xiaohongshu (RED or Little Red Book), WeChat, YouTube and Instagram.

There are aspirational influencers on China-based social media services who expanded to US-based platforms like YouTube as a way of “going international”. For some, having a presence on YouTube is believed to be a more sustainable option for generating income, as many Chinese services

¹ Crystal Abidin, *Internet Celebrity: Understanding Fame Online* (Emerald Publishing Limited 2018); David Craig, Jian Lin and Stuart Cunningham, *Wanghong as Social Media Entertainment in China* (Palgrave Macmillan 2021); Xiaofei Han, ‘Historicising Wanghong Economy: Connecting Platforms through Wanghong and Wanghong Incubators’ (2021) 12 *Celebrity Studies* 317.

² Craig, Lin and Cunningham (n 1).

do not share as much advertising revenue with creators. A growing number of YouTubers also started to distribute content to Chinese services since the boom of the *wanghong* economy.³ With the help of multichannel networks (MCNs) for translating, editing, operating and promoting localised content across platforms, some Western YouTubers received millions of followers on Chinese social media in only a couple of months.⁴ These YouTubers, although they deal with a diverse range of international audiences on their channels on US-based platforms, have to adjust their self-presentation and content to cater to a more localised Chinese market.

This chapter draws on a hybrid approach of digital ethnography and a comparative walkthrough to investigate 16 content creators' cross-platform work and labour conditions in navigating multiple Chinese and US-based platforms. The purpose is to explore the forces that enable creators' cross-platform expansion, and how they adapt to technologically and culturally different digital spaces. This research builds on studies of creative labour in the globalising social media entertainment.⁵ The aim is to understand to what extent creators' cross-platform labour conditions are empowering and precarious in an environment consisting of multiple US-based and Chinese platforms. I argue that, ultimately, cross-platform creator labour has become an imperative to thrive and survive within the globalising influencer economies. Cross-platform labour is a form of risk management for mitigating invisibility and reducing untoward dependency on a single platform. Yet, not only does it multiply creators' workload, but it also reinforces the paradox of empowerment and precarity, leading creators to adopt self-governance tactics to avoid new risks from their multiplatform expansion.

³ “*Wanghong* economy” refers to a business ecosystem built around *wanghong* on the Chinese internet, seeking to convert internet celebrities' online influence into profits. This concept was initially coined by Alibaba to boost its e-commerce in the mid-2010s, and it was further promoted by other internet giants and *wanghong* incubators. Xiaofei Han (n 1).

⁴ Melissa Goh, ‘Western Content Is Heading to Chinese Social Media Feeds’ (CNBC, 14 April 2017) <<https://www.cnbc.com/2017/04/13/western-content-is-heading-to-chinese-social-media-feeds.html>> accessed 23 June 2024.

⁵ Stuart Cunningham and David Craig, *Creator Culture: An Introduction to Global Social Media Entertainment* (NYU Press 2021).

2 CROSS-PLATFORM LABOUR IN THE GLOBALISING SOCIAL MEDIA ENTERTAINMENT

Using multiple social media platforms is not only a common practice among content creators, but a demand for them to expand personal brands across the internet to build up an audience base. Cross-platform labour refers to a set of work and strategies that creators and influencers are required to learn and perform in navigating the multiplatform environment to maximise their online visibility and possibilities of opportunities.⁶ These potential opportunities include relationship-building with various stakeholders within or outside of creator economies, commercial activities and monetary compensation.

Some scholars recognise the multiplatform environment where creative labour is situated. For instance, early research on “micro-celebrity” points out the online performance that involves individuals utilising diverse content formats and technologies to ramp up popularity on the internet.⁷ The rise of Silicon Valley-made services like YouTube has popularised the user practice of broadcasting the self. In addition, YouTubers, as cultural agents and innovators, have never been captive to YouTube’s architecture or technologies, as creators can share their content and identities across multiple platforms to build up online communities and maintain a successful presence.⁸ The rapid proliferation of social media platforms has brought about a creator culture and economy, leading to what Cunningham and Craig call “social media entertainment” (SME), an emerging proto-industry where creators utilise various content formats for developing businesses through their online followings across multiple platforms.⁹ Early discussions of micro-celebrity and SME centred around Anglo-centric, English-speaking and Global North platforms’

⁶ Abidin (n 1); Stuart Cunningham and David Craig, ‘Creator Governance in Social Media Entertainment’ (2019) 5 *Social Media + Society*; Ziyang Meng and Bjørn Nansen, ‘Chinese Video Creator Identities – A Cross-Platform Social Media Perspective’ (2022) 9 *PLATFORM: Journal of Media & Communication* <https://platformjmc.files.wordpress.com/2022/11/meng-nansen_chinese-video.pdf> accessed 23 June 2024; Leah Scolere, Urszula Pruchniewska and Brooke Erin Duffy, ‘Constructing the Platform-Specific Self-Brand: The Labor of Social Media Promotion’ (2018) 4 *Social Media+ Society*.

⁷ Theresa M Senft, *Camgirls: Celebrity and Community in the Age of Social Networks*, vol 4 (Peter Lang 2008).

⁸ Jean Burgess and Joshua Green, *YouTube: Online Video and Participatory Culture* (Polity Press 2018).

⁹ Stuart Cunningham and David Craig, *Social Media Entertainment: The New Intersection of Hollywood and Silicon Valley* (NYU Press 2019) 5.

phenomenon and contexts, though there has been a rise of attention to diverse cases around the world in recent years,¹⁰ showing the global operation of SME and diverse cultures of influencers and creators.

Under the multiplatform environment, creator labour is characterised by empowerment and precarity.¹¹ Through empowerment in entrepreneurial labour,¹² creators develop diverse income streams and navigate between digital spaces to minimise risks in the broader digital ecosystem. The abundance of platforms provides opportunities to creators; however, it also leads to competition that enhances individualism, economic insecurity and social inequality in the platform-dependent labour market.¹³ Working across these spaces, creators invest in relational labour to build and maintain audience communities,¹⁴ and practise aspirational labour, an entrepreneurial form of creative cultural production that might not be compensated.¹⁵ Creators commonly experience “nested precarities of visibility”, the unpredictability of social media creative labour in the levels of markets, industries, and platform features and algorithms.¹⁶

Whilst cross-platform labour practice is a norm among creators and influencers, it remains a relatively understudied and less understood area. Despite a growing thread of research on creators’ cross-platform strategies and labour conditions,¹⁷ studies on the labour working across services tend to be either generalised in an overarching multiplatform ecology or treated as if the

¹⁰ Crystal Abidin and Megan Lindsay Brown, *Microcelebrity Around the Globe: Approaches to Cultures of Internet Fame* (Emerald Publishing Limited 2019); Cunningham and Craig (n 5).

¹¹ Cunningham and Craig (n 9) 65.

¹² Gina Neff, Elizabeth Wissinger and Sharon Zukin, ‘Entrepreneurial Labor among Cultural Producers: “Cool” Jobs in “Hot” Industries’ (2005) 15 *Social Semiotics* 307.

¹³ Thomas Poell, David B Nieborg and Brooke Erin Duffy, *Platforms and Cultural Production* (John Wiley & Sons 2021) 131.

¹⁴ Nancy K Baym, *Playing to the Crowd: Musicians, Audiences, and the Intimate Work of Connection* (NYU Press 2018).

¹⁵ Brooke Erin Duffy, Urszula Pruchniewska and Leah Scolere, ‘Platform-Specific Self-Branding: Imagined Affordances of the Social Media Ecology’ (2017) *ACM International Conference Proceeding Series*.

¹⁶ Brooke Erin Duffy et al, ‘The Nested Precarities of Creative Labor on Social Media’ (2021) 7 *Social Media + Society*.

¹⁷ Zoe Glatt, ‘We’re All Told Not to Put Our Eggs in One Basket: Uncertainty, Precarity and Cross-Platform Labor in the Online Video Influencer Industry’ (2022) 16 *International Journal of Communication* 1; Lee Hair, Ross Bonifacio and Donghee Yvette Wohn, ‘Multi-Platform Practices among Digital Patronage Creators’ (2022) 28 *Convergence* 1438; Scolere, Pruchniewska and Duffy (n 6).

nuances between platforms did not lead to different conditions. Cross-platform work requires increased labour time and practice, but also furnishes creators with greater degrees of autonomy and independence.¹⁸ Yet, the coexistence of cross-platform empowerment and precarity requires further investigation. The claim for precarious labour needs to be further contextualised and nuanced by specifying conditions that induce and form such precariousness.¹⁹ This chapter explores creator labour practice as it takes shape across Chinese-language social media and US-based platforms. It develops current knowledge of creative labour in the globalising digital economies, attempting to understand the specific conditions of platform empowerment and precarity.

Current knowledge on cross-platform labour and multiplatform practices among creators is based on the investigation of SME driven by US-based platforms, which might not be applicable to creators who work across culturally different digital spaces. The rapid expansion of the Chinese influencer industry has captured both academic and public attention in recent years, and it presents a distinctive case, as the *wanghong* platform landscape shows greater competition and collaboration compared with its Western counterpart.²⁰ Despite the growth of research on *wanghong* labour²¹ and studies looking at influencer cultures beyond the Global North,²² existing scholarship on creative labour is centred around analyses of US-based platforms and Euro-American phenomena, and there is a lack of research on the non-Western and transnational context. This research aims to fill in the gap by providing a novel case on the labour practice of cross-platform creators who navigate between the Chinese *wanghong* industry and the SME built around Silicon Valley-owned platforms.

In this chapter, I focus on cross-platform labour to highlight the knowledge, work and strategies that creators need to learn and develop when working across different digital spaces. The research presented here is part of the ongoing project investigating cross-platform creator practices on multiple Chinese and US-based platforms. To understand cross-platform labour and

¹⁸ Poell, Nieborg and Duffy (n 13) 194.

¹⁹ Jian Lin, *Chinese Creator Economies: Labor and Bilateral Creative Workers* (New York University Press 2023) 4.

²⁰ Craig, Lin and Cunningham (n 1).

²¹ Stuart Cunningham, David Craig and Junyi Lv, 'China's Livestreaming Industry: Platforms, Politics, and Precarity' (2019) 22 *International Journal of Cultural Studies* 719; Jian Lin and Jeroen de Kloet, 'Platformization of the Unlikely Creative Class: Kuaishou and Chinese Digital Cultural Production' (2019) 5 *Social Media+ Society* 1.

²² Abidin (n 1).

work conditions, I adopted a digital ethnographic approach²³ to closely investigate creators' platform practices and experiences, and a participant-led comparative walkthrough method²⁴ with creators to understand their perceptions of the multiplatform environment in which they were situated. I collected different data from 2021 to 2024 through semi-structured in-depth interviews with 16 content creators based in different locations (China, South Korea, Australia, the United States, Canada, Germany, France, England) and varying channel sizes. The design of the interview activity included participant-led walkthroughs, which involved six creators demonstrating their everyday platform use. They showed me how they navigated platform features and managed multiple accounts across social media. I also adopted online and offline participant observation of creators' content production and activities on Chinese and US-based platforms, qualitative content analysis on their profiles and posts, and autoethnography to reflect my personal experience as an Australia-based Chinese creator since 2017.

In the following sections, I explore the entrepreneurial cross-platform strategies that creator participants commonly adopted, the paradox of empowerment and precarity they faced when navigating monetisation and platform networks, and how creators utilised self-governance tactics to gain cross-platform autonomy in the context of Chinese and US-based platforms. The findings presented below mainly draw on the data collected through interviews and participant observations, whereas the fieldnotes from autoethnography, participant-led walkthroughs and qualitative content analysis inform the context of this research and prompt understandings surrounding cross-platform creator labour. The data collected through different methods was coded in Nvivo for thematic analysis.

3 ENTREPRENEURIAL CROSS-PLATFORM STRATEGIES

Becoming a content creator is entrepreneurial in nature. Social media production appealed to be an entrepreneurial path that could open up endless opportunities in life, as the majority of my participants started making videos in their

²³ Sarah Pink and others, *Digital Ethnography: Principles and Practice* (SAGE 2016).

²⁴ Stefanie Duguay and Hannah Gold-Apel, 'Stumbling Blocks and Alternative Paths: Reconsidering the Walkthrough Method for Analyzing Apps' (2023) 9 *Social Media + Society*; Ben Light, Jean Burgess and Stefanie Duguay, 'The Walkthrough Method: An Approach to the Study of Apps' (2018) 20 *New Media & Society* 881.

twenties and thirties, a period when they also navigated their lives and career pathways. As Volker, a German creator participant who produced videos in fluent Mandarin, noted, “If you have a reach on social media, you can do any business you’re interested in with it.” Similar to other creators’ experiences, Volker did not have a clue where content production and a social media profile would lead him. “Sometimes you just start somewhere and don’t really know where it ends,” Volker said, “but find your way while going.”

As commercialising and professionalising entrepreneurial creators,²⁵ participants not only produced videos, images and text posts. They also developed strategies for exploring different content genres, and testing multiple platforms to find out which one worked for them. For instance, Ella, a Chinese creator travelling around the world with her British partner Scott, initially started on YouTube but shifted her attention to Chinese platforms. Ella registered accounts on Chinese services to distribute her YouTube videos, and gradually found that her content posted to the Chinese market received more traction. She said that it was a mess to upload content to more than seven platforms. But over time, Ella and Scott shifted more focus to bilibili and Xiaohongshu, where they received the largest number of online followers. Ella explained, “It was mainly because our initial development on YouTube didn’t go well, so now we focus more on our Chinese audience.”

Ella and Scott’s shift of attention from YouTube to Chinese social media was not an individual case. Other participants also shared similar experiences of gradually developing more interest in Chinese services once they witnessed a constant growth in metrics and possibilities for monetisation. Cross-platform navigation shows the entrepreneurial practice of embracing new technologies to pursue sustainability. Although multiplatform usage exhausts creators’ workload, it also functions as a form of risk management to avoid platform precarity.²⁶ Some participants initially started on YouTube and prioritised the platform because of the well-established YouTube Partner Program (YPP) that could potentially bring shared advertising revenues to them. But growing on YouTube was not an easy task, as small creators are subject to “algorithmic discrimination” and that their content might be deprioritised from the recommendation system.²⁷

In comparison, it is relatively easier to grow an organic online following on Chinese social media from scratch. All of my participants had larger sub-

²⁵ Jean Burgess and Joshua Green, ‘The Entrepreneurial Vlogger: Participatory Culture beyond the Professional-Amateur Divide’, *The YouTube Reader* (National Library of Sweden/Wallflower Press 2009).

²⁶ Cunningham and Craig (n 9) 94.

²⁷ Glatt (n 17).

scriber counts on Chinese services compared with their accounts on US-based platforms. Chinese *wanghong* industry offers potentially more lucrative opportunities for creators due to the combination of technological advances and business model innovations.²⁸ The rise of the Chinese internet and globalising SME allowed participants to learn about China-based services, hence they were willing to seek opportunities and even shifted more attention to these platforms.

Creators' entrepreneurial practices also include different content strategies that they learned from trial and error across platforms. Some participants produced tailored content for different platforms based on their imaginations of targeted audiences, platform affordances and the abilities to keep up with platform changes, a practice known as "platform-specific self-branding".²⁹ But they also learned about the risk associated with online visibility, because there is no guarantee that a tailored, crafted video would blow up on a platform, as each service has its unique culture and algorithmic architecture. Thus, some participants distributed the same content across multiple Chinese and US-based services to test among various audiences. Cross-platform distribution saves the effort of tailoring content and establishing an account when coming to a new platform. It also allows creators to compare which platform they could achieve the best performance in metrics. This cross-platform practice of optimising conditions for maximising creators' online visibility is a form of "platform migration", which also happens when a platform shows the tendency to rise or fall in its development.³⁰ In this way, participants learned the uniqueness of each platform regarding audience demographics, platform cultures and vernaculars.³¹ Some creators developed a personalised "social media ecology" that involves an ongoing effort to stabilise an ecosystem of platform choices while embracing changes.³² It led to prioritising a platform if channels and videos performed well in metrics, or deprioritising a service that did not contain the right audience base.

²⁸ Craig, Lin and Cunningham (n 1).

²⁹ Scolere, Pruchniewska and Duffy (n 6).

³⁰ Casey Fiesler and Brianna Dym, 'Moving Across Lands: Online Platform Migration in Fandom Communities' (2020) 4 Proceedings of the ACM on Human-Computer Interaction 1; Meng and Nansen (n 6).

³¹ Martin Gibbs and others, '#Funeral and Instagram: Death, Social Media, and Platform Vernacular' (2015) 18 Information, Communication & Society 255.

³² Xuan Zhao, Cliff Lampe and Nicole B Ellison, 'The Social Media Ecology: User Perceptions, Strategies and Challenges' (2016) Proceedings of the 2016 CHI Conference on Human Factors in Computing Systems <<https://dl.acm.org/doi/10.1145/2858036.2858333>> accessed 23 June 2024.

The strategy of prioritising or deprioritising a service shows creators' cross-platform autonomy. It is a way to mitigate the risks of invisibility under the volatile platform environment. Most of my participants started with one or two platforms, and gradually moved towards multiplatform distribution to attract more audiences. Apart from shifting the attention from YouTube to Chinese services, some participants went in the opposite direction – expanding from Chinese to US-based platforms and hoping for a sustainable way of monetisation. Toronto-based Chinese creator Gloria Gao, for example, who had around half a million subscribers on bilibili, said that if she had the same number of followers on YouTube, she could rely on the income generated from YPP without worrying about taking brand deals to support herself. Although participants had cross-platform autonomy of moving between Chinese and US-based platforms, the precarity in influencer industries suggests that these creators had to constantly look for opportunities to diversify their income streams and minimise the risk of instability.

Becoming a creator appears to be “cool”, creative and autonomous work in the “hot” influencer industries, despite the high employment risks and precarity associated with this entrepreneurial labour practice.³³ Cross-platform practice is a response to the “nested precarities of visibility” in which creators need to deal with the changes in audiences' tastes and advertisers' expectations, the uncertainty in the highly competitive platform ecology and the changing features and algorithms within a platform.³⁴ To tackle the risks of invisibility, entrepreneurial creators adopt the strategy of cross-platform navigation, an ongoing learning and testing process in which creators develop an understanding of the uniqueness among services, and identify what type of content is suitable for circulating on which platform, and which service contains more of their targeted audiences and has commercial values.

Many participants implied that growing and managing multiple Chinese and US-based platforms simultaneously would be an ideal plan. Yet, a lot of them could not make this work due to the heavy workload of content production and multiplatform management. The competitive platform environment required creators to make strategic choices, such as prioritising or deprioritising services based on the feedback they received, their personal habits and plans for channels' development. Cross-platform autonomy demonstrates creators' entrepreneurial labour to build a sustainable online self-brand, gain recognition from a wider audience and seek business potential in the highly competitive influencer industries. Creators' cross-platform practice is empowering

³³ Neff, Wissinger and Zukin (n 12).

³⁴ Duffy et al. (n 15).

as it helps mitigate the risks, but it also comes with restrictions from various factors, which intensifies their precarious labour conditions.

4 MONETISATION AND THE PARADOX OF EMPOWERMENT AND PRECARIETY

Becoming an entrepreneurial creator is driven by the desire for creativity, and the urge to brand the self, hoping that having a profile and an online following could be beneficial in the digital reputation economy.³⁵ Yet, the path to becoming an entrepreneurial creator is mixed with the joy of creativity and the risk of instability. Most of my participants relied on sponsored deals to monetise their content production. Some full-time creators were candid with me that their income generated from brand sponsorship on Chinese social media was not stable. The income fluctuates as it depends on the demands in the market and advertisers' budgets. Hence, to deal with the unstable sponsored demands, some participants explored other ways of monetising their content, such as using platforms' integrated live-stream and e-commerce features to promote and sell online courses, directing viewers to join membership communities on other platforms, or offering other business services such as consulting and workshops. Meanwhile, the participants with a smaller subscriber count (e.g. less than 10,000 on a platform) did not even expect to make that much money but treated content production as a hobby.

Cross-platform usage is empowering as creators can always seek diverse ways of branding and content monetisation and move around the Chinese *wanghong* economy and international SME. However, it also reflects the precarity across influencer industries, where creators cannot receive a stable income on a single platform despite how hard they work. Unlike YPP,³⁶ which shares 55% of advertisement revenue with creators, Chinese platforms do not offer creators a large amount of revenue shares. Services like bilibili and ByteDance-owned Xigua Video provide revenue-sharing features and incentive campaigns for creators to earn money. Yet, according to my participants,

³⁵ Alison Hearn, 'Structuring Feeling: Web 2.0, Online Ranking and Rating, and the Digital "reputation" Economy' (2010) 10 *Ephemera: Theory & Politics in Organization*.

³⁶ YouTube Partner Program (YPP) offers monetisation opportunities for eligible creators. It enables creators to earn revenue from their Watch Page and Shorts Feed advertisements. YouTube will pay creators 55% of net revenues from advertisement displayed on Watch Page, and 45% of the revenue in the Shorts Monetization Module. YouTube Help, 'YouTube partner earning overview' (*YouTube Help*, 15 February 2024) <<https://support.google.com/youtube/answer/72902?hl=en#zippy=%2Cwhats-my-revenue-share>> accessed 23 June 2024.

the earnings from these Chinese platforms were only a small amount. Creators had to rely on the income generated from multiple streams and maintain a cross-platform presence to boost the potential for brand sponsorship. Creator participants on Chinese and US-based platforms were caught in the paradox of platform empowerment and precarity. Nevertheless, Chinese services have the affordances of the creator marketplace, which manifests the paradox of empowering creators with more monetisable opportunities but circumscribing creators with strict controls.

4.1 Creator Marketplace

“Creator marketplace”³⁷ (CM) is an integrated commercial service on social media platforms, offering features for influencer marketing, campaign management and analytical dashboards for creators’ channel metrics. CM also plays the role of mediating between creators, agencies and brands. In the Chinese digital space, the adoption of CM can be traced to around 2012 when Sina Weibo launched “Weirenwu” (or micro-tasks) as one of the company’s business strategies.³⁸ But the trend of CM did not start until short video apps accelerated in China in the late 2010s, when Kuaishou and Douyin both launched their CM services, normalising the practice of doing commercial activities through the platforms’ built-in interfaces.³⁹ There has been a proliferation of similar services across Chinese social media, including bilibili’s Huahuo, Xiaohongshu’s Pugongying and WeChat Official Account’s Huxuan. Chinese platform TikTok, which operates internationally, also has its CM. US-based platforms launched similar services, such as YouTube BrandConnect, Instagram Creator Marketplace and Snapchat’s Snap Star Collab Studio. Compared with Chinese services, the features on US-based platforms came slightly later and have limited access to a small group of creators in the United States.⁴⁰ In contrast, the adoption of CM on Chinese plat-

³⁸ The Paper, ‘Are Douyin and Kuaishou Becoming Weibo? [抖音、快手正在变成微博?]’ (*The Paper*, 7 August 2018) <https://www.thepaper.cn/newsDetail_forward_2324445> accessed 23 June 2024.

³⁹ Wenqian Xiang and others, ‘The Evolution and Breakthrough of Kuaishou’s Commercialization [快手商业化的进化与突围]’ (Orient Securities 2021) <https://pdf.dfcfw.com/pdf/H3_AP202101211452765930_1.pdf> accessed 23 June 2024.

⁴⁰ Meta, ‘Introducing Creator Marketplace, Where Brands Can Discover Creators to Collaborate With’ (*Instagram for Business*, July 2022) <<https://business.instagram.com/blog/creator-marketplace-discover-partnerships>> accessed 23 June 2024; YouTube Help, ‘Get Started with YouTube BrandConnect – YouTube

forms is more popular. Chinese platforms encourage creators to partner with brands through content production, showing that everyone has the potential to leverage online influence into commercial benefits. Yet, Chinese services also require commercial transactions to be made through CM interfaces. Platforms charge a commission fee in each transaction from both sides of advertisers and creators, ranging from 5% to 20%, a business model that is similar to middleman-type marketing agencies.

The prevalence of CM on platforms shows the transformation in influencer industries in recent years. Traditionally, third-party intermediaries like MCNs played a role in assisting the professionalisation and monetisation of creators, and evolving platforms into hybrid cultural-commercial space in the mid-2010s.⁴¹ Yet, CM as integrated commercial services on platforms seems to take up part of the work from MCNs. CM's role as a middleman match-maker is also nothing new in the influencer economy, but the difference is that platforms now strengthen their power in monopolising the commercial space. Since the early 2010s, marketing firms developed their own tools and technologies to streamline the dealmaking process, selecting, sorting and pricing influencers based on certain metric benchmarks and marketers' own criteria.⁴² CM functions as an algorithmic-driven influencer management tool that supports marketers and brands in discovering creators for advertising campaigns based on values such as brand suitability,⁴³ which also helps to gatekeep the creators with monetisable capacities.

Creator participants had ambivalent attitudes towards CM on Chinese platforms. Seoul-based Chinese creator Henry Li commented on bilibili's Huahuo as a place that allows creators to be discovered by brands and safeguard their payment. He said that the more tedious process of negotiation with brands often takes place on WeChat, as Huahuo does not offer messaging functions but "simply for placing orders". Ella also recognised the convenience of CM in getting brand deals. However, when talking about Xiaohongshu's Pugongying, she also pointed out its downsides, such as making a sponsored post more like an advertisement, and the platform taking out a portion of a brand deal's revenue from creators. On Xiaohongshu, a post registered through CM used

Help' (*YouTube Help*, 26 October 2023) <<https://support.google.com/youtube/answer/9385307?hl=en>> accessed 23 June 2024.

⁴¹ Ramon Lobato, 'The Cultural Logic of Digital Intermediaries: YouTube Multichannel Networks' (2016) 22 *Convergence: The International Journal of Research* 348.

⁴² Emily Hund, *The Influencer Industry: The Quest for Authenticity on Social Media* (Princeton University Press 2023) 64–76.

⁴³ Sophie Bishop, 'Influencer Management Tools: Algorithmic Cultures, Brand Safety, and Bias' (2021) 7 *Social Media + Society*.

to have a handshake sign displayed at the bottom left corner of the thumbnail, showing the advertising nature of the post. Yet, the sign has been removed since January 2023, which makes it difficult for users on Xiaohongshu to spot a sponsored post, but brands and creators could make commercial promotion appear to be more authentic and advertisement-free.

With CM on Chinese platforms, creators do not need to prepare a media kit or a personal website showcasing previous projects, which saves time and effort in self-branding and pitching to advertisers. CM also simplifies and safeguards the process of commercialisation, as it makes sure that creators get paid legally. CM also recommends commercial opportunities to creators based on their content niche and channel positioning. It helps creators navigate the industry and figure out how much to charge for a brand deal, as the system gives a recommended personalised quote based on various factors. As influencer industries lack transparency on how deals are made and prices are negotiated based on different metric benchmarks,⁴⁴ CM seems to be a solution for tackling issues with precarity and influencer pay gaps.

Yet, CM reinforces the contingency of cultural production and practices on platforms,⁴⁵ offering opportunities to creators but centralising platforms' institutional power in governing online commercial activities. It facilitates the commercialisation of content production, but also sets rules in regulating creator practice. Some brands and agencies prefer not to register a deal on CM to avoid platforms' charge of commission fees. The risk would then fall on the creators. For example, if a creator posted a sponsored video on Xiaohongshu and did not notify the platform through the marketplace, not only might the video be taken down, but the account might receive a warning for violating community guidelines. As a result, creators are caught between a liminal space of being harnessed and disciplined at once.⁴⁶ They are empowered by CM as it increases chances for monetisation, yet creators also need to ensure their commercial activities are not against platform regulations.

CM also restricts the cross-platform distribution of sponsored content, which intensifies the precarious labour conditions. Traditionally, creators can charge more money from a sponsor through a package deal that delivers content to all their subscribers across platforms, as social media metrics are the *de rigueur* currency for negotiating compensation.⁴⁷ It is also a norm among

⁴⁴ Hund (n 42) 72.

⁴⁵ Poell, Nieborg and Duffy (n 15).

⁴⁶ Elaine Jing Zhao, '11 Wanghong Liminal Chinese Creative Labor', *Creator Culture* (New York University Press 2021).

⁴⁷ Brooke Erin Duffy, *(Not) Getting Paid to Do What You Love: Gender, Social Media, and Aspirational Work* (Yale University Press 2017) 78.

influencers practising cross-platform promotion to meet advertisers' expectations of cross-traffic and circulation to a wider audience.⁴⁸ However, CM on each Chinese social media governs and monopolises commercial activities within a single platform, meaning that creators cannot cross-promote sponsored content without registering the brand deal through a platform. Creators need to adopt a platform-specific approach to consider each service's regulations, instead of cross-platform distribution to maximise online visibility. In this case, a creator's commercial value is bounded within a single platform's metrics, rather than the numbers from all the platforms combined. Although CM empowers some creators with commercial opportunities, its control of commercial activities within a platform's boundary sets limits to creators' cross-platform content distribution and monetisation.

4.2 Platform Poaching and Relational Labour

Not only does CM reinforce the paradox of platform empowerment and precarity, but the networks surrounding platforms also intensify this labour condition. Creator participants were involved in various WeChat groups that were managed by different platform corporate representatives. These employees from Chinese platforms practise what I call "platform poaching", a talent-scouting process of recruiting creators from competitor services by offering creators platform support and monetary incentives. Chinese platforms have adopted a "creator first" strategy and optimised conditions for creators to grow, unlike US-based platforms that position creators as minor stakeholders in their development.⁴⁹ Hence it is common for Chinese services to offer incentives and funds to entice creators to join a platform and contribute to the content pools. Platform representatives work as intermediates to recruit creators and share information on the benefits of joining a service.

Creators need to identify whether it is worth spending time and effort to create a profile and consistently post on the new service to meet the requirement for incentives or creator funds. However, some participants only realised that joining a new service was a waste of time after a few months of trial and error. For instance, Volker was on more than 10 Chinese platforms, and many of the services he adopted were through platform poachers' invitations. It was useful for a Western creator like him to get to know Chinese platforms and features. Yet, he also told me that on some platforms he did not see consistent growth in metrics despite constantly posting content there. Volker adopted a browser service called Dayuhao owned by Alibaba, owing to the tech giant's

⁴⁸ Abidin (n 1) 92–93.

⁴⁹ Craig, Lin and Cunningham (n 1) 171.

reputation. Although he did get many views at first, he then noticed that Dayuhao did not contain a large audience base for video consumption, despite the service being connected to the wider Alibaba-owned platform ecosystem. As a result, Volker expressed that he might give up on it and stop using other similar services with limited feedback. For creators like Volker, adopting new services through platform poaching could be rewarding, as they had contact with platform representatives and sometimes received monetary compensation. However, the cross-platform expansion is not always empowering. Creators embrace multiple services along with the rapid platform evolution.⁵⁰ Yet, it not only adds to the workload, but also reinforces new risks of invisibility as some platforms themselves fail to take a share in the competitive digital economies, not to mention offering benefits to creators.

To some extent, platform representatives help to address issues with nested precarities of visibility,⁵¹ as they assist creators in understanding platform features and monetisation opportunities. Some platform staff even offered training for creators to improve their content quality, and shared tricks with creators in gaming the algorithms.⁵² Nevertheless, platform poaching also shows the uncertainty in a competitive platform economy that involves a variety of human labour, which requires creators to develop a collaborative approach to work with these platform employees. Creators need to practise relational labour⁵³ to maintain connections with different stakeholders, including but not limited to platform employees, audiences, agencies and MCNs, to manage and expand their online channels and brands.

5 SELF-GOVERNANCE TACTICS FOR CROSS-PLATFORM AUTONOMY

In the context of Chinese and US-based services, creators' practices of relational labour often take place in an online setting and are dependent on platforms. Creators need to spend effort in content production, develop knowledge to understand platforms and the surrounding actors, and identify when is a good time to adopt or give up on a service. To navigate the complexity of

⁵⁰ Arturo Arriagada and Francisco Ibáñez, "'You Need At Least One Picture Daily, If Not, You're Dead': Content Creators and Platform Evolution in the Social Media Ecology' (2020) 6 *Social Media and Society*.

⁵¹ Duffy et al. (n 16).

⁵² Kelley Cotter, 'Playing the Visibility Game: How Digital Influencers and Algorithms Negotiate Influence on Instagram' (2019) 21 *New Media & Society* 895.

⁵³ Baym (n 14).

Chinese and US-based platforms and the paradox of platform empowerment and precarity, participants employed diverse self-governance tactics to enhance their cross-platform autonomy. These tactics include cross-platform profile management, self-curation on content, distribution and online performance.

5.1 Cross-platform Profile Management

Governing a cross-platform self-brand is considered an important tactic in navigating a complex and dynamic Chinese *wanghong* industry and SME. Cross-platform profile management is a way to ensure that creators' brands across social media are under their control. For some creators, adopting multiple platforms is a way to protect their authentic accounts and intellectual property, as they deal with issues of copyright infringement and impersonation. Some creators' content was re-uploaded elsewhere by unauthorised people, due to the rampant "borderline practices" on social media, which refers to ambiguous or infringing content transfer activities that are legally and ethically questionable and are potentially crossing various boundaries.⁵⁴ The benefits offered by platforms motivated some individuals and agencies to impersonate creators' accounts. The circulation of content across platforms and cultural landscapes shows a practice of "spreadability" – the technical and cultural potential for people and institutions to share content in multiple ways⁵⁵ – though there might be an issue with piracy as people profit from the unauthorised content distribution.

Two Chinese participants noted that they did not worry too much about impersonated accounts. These creators were considered near-top and mid-tier influencers on Chinese services – one had around 2 million subscribers across platforms, and the other reached 400,000 followers on Douyin. They suggested that unauthorised content transfer was a form of free promotion of their videos. And it was also beyond their control to prevent borderline practices when some videos went extremely viral. However, other participants were more concerned about impersonated accounts and copyright infringement. A French creator with over a million followers on Douyin mentioned that there were people pretending to be her on bilibili and TikTok and scamming her fans. For these creators whose copyright was invaded by borderline practices, they had to spend effort reporting impersonated accounts on the system and requesting

⁵⁴ Chunmeizi Su and Bondy Valdovinos Kaye, 'Borderline Practices on Douyin/TikTok: Content Transfer and Algorithmic Manipulation' (2023) Media, Culture & Society.

⁵⁵ Henry Jenkins, Sam Ford and Joshua Green, *Spreadable Media: Creating Value and Meaning in a Networked Culture* (New York University Press 2013).

multiple platforms to remove infringed content. Services such as bilibili and YouTube have the features of protecting original content and detecting copyright-infringed videos, yet not all the platforms have this feature. The reporting process is also tedious and time-consuming. Although borderline practices are legally and ethically questionable and in the grey zone, they play a role in the development of platforms for filling content in the content pools and encouraging user interaction,⁵⁶ thus some platforms did not set up strict regulations on these online activities. In this circumstance, some participants adopted multiple platforms and registered accounts everywhere, which functions as a way to safeguard their originality and govern personal brands across the platform ecosystem.

5.2 Self-curation on Content, Distribution and Performance

Conducting self-governance is a must for creative workers in China where commercial cultural production is both promoted and circumscribed.⁵⁷ Content creators on Chinese platforms are afforded by features such as CM in monetising their content. Yet, they need to be cautious not to violate the strict platform regulations imposed by the state. The affordances of CM on Chinese platforms gatekeep commercial activities under the governance of the state, as platformisation of culture production is also contingent on government policies.⁵⁸ For example, the State Administration for Market Regulations issued the *Measures for the Administration of Internet Advertising* in February 2023, which is an update from the previous *Interim Measures* issued in June 2016,⁵⁹ regulating commercial activities on the Chinese internet since the booming of *wanghong* economy in the mid-2010s. The new *Measures* require influencers and creators to make advertisements identifiable and declare the advertising nature in the posts, restricting the practice of “soft selling”, an indirect and subtle way of promoting a product. CM on Chinese services and their content moderation process suggests an online environment with official endorsement of commercialisation and stricter state regulation of content.⁶⁰

⁵⁶ Su and Kaye (n 54).

⁵⁷ Lin (n 19) 4.

⁵⁸ Chunmeizi Su, ‘Contingency, Precarity and Short-Video Creativity: Platformization Based Analysis of Chinese Online Screen Industry’ (2023) 24 *Television & New Media* 173.

⁵⁹ Todd Liao and Bonnie Li, ‘New Measures for Online Advertising in China: What You Need to Know’ (10 April 2023) <<https://www.morganlewis.com/pubs/2023/04/new-measures-for-online-advertising-in-china-what-you-need-to-know>> accessed 23 June 2024.

⁶⁰ Craig, Lin and Cunningham (n 1) 49.

To maintain a successful online presence and conduct commercial practice on Chinese social media, participants often self-curated their content and online behaviours to comply with platform regulations. A Chinese creator mentioned to me that she could reel off the sensitive keywords that were not allowed to be used on Xiaohongshu. For example, a user might avoid using adverbs like “*zuì*” (literally meaning the most) when promoting a product, as it is seen by Xiaohongshu that the user exaggerates the effect of the product, which might lead to the app giving a warning to the user. Creators not only need to learn these rules encoded in platforms’ algorithmic systems and know how to play the visibility game,⁶¹ but also gradually develop their self-perceived rules in governing their online performance.

In addition, some creator participants signed contracts with Chinese platforms, which provided them with a sense of stability but also restricted their cross-platform distribution to other Chinese services. Thus, creators often self-govern their cross-platform distribution. Three of my Chinese participants suggested that they sign a contract or reach an agreement with a Chinese platform, and they did not sign any MCNs. Once a channel grows to a certain scale, some Chinese platforms offer creators a chance to sign a contract for exclusive distribution rights. Some platform companies provide these creators with a base salary every month. A contract is often short-term and lasts for two to three years, and the conditions vary among creators regarding the sizes of their online following. Under the contract, creators have to follow some requirements, such as uploading a certain number of videos per month, always posting on the signed platform first and then distributing content to other social media services 24 or 48 hours after the initial post. Some creators could not share content on certain platforms if these services are considered rivals of the signed platform. For example, a Chinese participant who signed a contract with bilibili told me that she was not able to post videos on Douyin and ByteDance’s ecosystem. But she can still use TikTok, YouTube or other US-based services operating outside the Chinese video market, as they do not directly compete with Chinese *wanghong* platforms.

The contractual relationship is a way for creators to receive monthly wages and gain a sense of stability in the precarious creator industry. Contracted participants did not tell me the details of the agreement or the amount of the base salary because of confidentiality. Yet, some mentioned that the platform’s base salary was not much, and it sounded more like pocket money rather than something that could cover creators’ everyday expenses. Chinese platforms’ contracts offer creators temporary stability to some degree, but this type of short-term commercial agreement cannot guarantee income or job security.

⁶¹ Cotter (n 52).

Creators still worked under flexible freelancing conditions without the benefit of vacation time and pay, insurance or superannuation provided by a company. It is unclear whether the contractual relationship between creators and Chinese platforms is a type of collaboration or employment. It also poses constraints to creators' cross-platform visibility, and the contractual relationship reinforces the dependency of creators' cultural production on platforms.⁶²

This type of contract with Chinese platforms and platform poaching both reveal that creators are required to invest in relational labour, "the ongoing, interactive, affective, material, and cognitive work of communicating with people over time to create structures that can support continued work".⁶³ Compared with US-based platforms, creators on Chinese social media are involved with more relationship-building work, as they have to navigate the complex networks surrounding platforms and make decisions between platform exclusivity and cross-platform distribution.

Despite creators being able to receive some financial and platform support by signing a contract with a platform, it is hard to determine if the benefits of a contract outweigh cross-platform autonomy. Cross-platform branding is crucial for creators to expand an audience base, and keep the vitality of their online presence and longevity of online brands. But signing an exclusive contract with a platform means giving up a part of the autonomy of cross-platform distribution. A contract might even distance creators themselves from the larger digital economy, which further reinforces dependency on a single platform. I observed that Xigua Video signed contracts with small creators with several thousand or tens of thousands of subscribers from 2019 to 2022. The platform encouraged these creators to make videos and share the benefits they enjoyed under exclusive contract conditions. Yet, as Xigua Video paused these monetary benefits in 2022 and creators' contracts ended, I noticed that some Xigua creators came back to bilibili. However, because of the lack of updates and interactions with audiences on bilibili in the last two years, it was hard for these creators to keep up their popularity. Thus, these creators had to spend extra effort in revitalising the channel on a platform that they were not allowed to use for a long time due to their contracts with ByteDance's Xigua Video. A temporary contractual relationship with a platform brought certain benefits to creators when the platform expanded rapidly. However, creators have to balance the risks and benefits of the short-term quasi-employee labour relationship with platforms, govern their distribution on how often they need to post and where they can share, and carefully consider how to make their online brands sustainable across platforms.

⁶² Poell, Nieborg and Duffy (n 13).

⁶³ Baym (n 14) 19.

Nevertheless, US-based platforms provide some leeway for some cross-platform creators on Chinese social media to escape from the strict state-control platform regulations. Most of my participants had experience of content being moderated by Chinese platforms. Sometimes they found that a video was taken down by one platform but it had no issue elsewhere, as regulations vary across services. Compared with Chinese creators, European participants had more trouble navigating the complicated regulations on Chinese platforms due to language barriers and cultural differences. Before posting any videos on Chinese services, these European creator participants often consulted with their friends or producers from their MCNs to avoid anything that seemed inappropriate to share on the Chinese internet. Yet, this is not to say that Chinese participants are not subjected to strict moderation on Chinese platforms. Participants learned from experience that there were some words and things they should avoid using and putting online. They often self-censored their content by taking out the possibly sensitive parts in a video, or edited different versions of the same video and posted them separately on Chinese services and YouTube. The self-censored one would be posted on Chinese social media. On YouTube, there would be an uncensored full version. But sometimes it is the other way around depending on the content. In this way, creators can reduce the risk of content being moderated on a platform.

Having the freedom to move between Chinese and US-based services does not mean, however, that creators have the freedom to post whatever they want, as they also need to be consistent with their online identity across platforms.⁶⁴ It is crucial that creators manage their online performance to avoid significant inconsistency between the content shared on Chinese and US-based platforms. To meet expectations from diverse audience communities across platforms, participants often curated their cross-platform online performance. It is a common technique that micro-celebrities use to attract attention and publicity, and maintain popularity by strategically and carefully constructing their self-presentation.⁶⁵ Self-curation here is more than managing impressions among “imagined audiences”,⁶⁶ but an act of balance between what creators want to do versus what they should do. Within the Chinese context, meticulous self-governance is needed among creative workers to reach a balance between individual aspirations, the Chinese state’s expectations and the capitalist sub-

⁶⁴ Meng and Nansen (n 6).

⁶⁵ Alice Emily Marwick, *Status Update: Celebrity, Publicity, and Branding in the Social Media Age* (Yale University Press 2013).

⁶⁶ Alice E Marwick and danah boyd, ‘I Tweet Honestly, I Tweet Passionately: Twitter Users, Context Collapse, and the Imagined Audience’ (2011) 13 *New Media & Society* 114.

sumption of creative labour.⁶⁷ Participants actively conducted self-governance when navigating US-based and Chinese services, making sure their content production, distribution and online performance were under their control and not crossing the line that might trigger risks of invisibility.

6 CONCLUSION

The Chinese *wanghong* industry and social media entertainment built around Silicon Valley-based platforms have flourished over the past decade. As influencer economies expand internationally, numerous content creators utilise innovative features on platforms to fulfil their creative aspirations, cultivate an online audience and even build a lucrative business. Yet, as competition in influencer industries intensifies, creators also constantly adjust their content production and distribution strategies and seek opportunities across multiple platforms.

This chapter has discussed creators' cross-platform work and labour practices across multiple Chinese and US-based social media services. I have explored creators' motives and strategies for moving around culturally diverse platforms, the affordances that enable them to speed up the commercialisation and monetisation of content production, the relational labour in navigating networks surrounding platforms, and the restrictions posed to them. Creators' entrepreneurial cross-platform use is a way to construct an environment where they could maximise opportunities and reduce platform dependency. Yet, it also brings them problems with the paradox of empowerment and precarity when exploring the creator marketplace affordances for monetisation, platform poaching practices, contractual relationships with platforms and various regulations. To deal with the challenges and maintain cross-platform autonomy, creators conduct self-governance tactics, such as cross-platform profile management, self-curation of content, distribution and online performance. Cross-platform labour on Chinese and US-based services is a risk management strategy to mitigate precarity and platform dependency in the unstable and competitive platform environment and influencer industries. Ultimately, cross-platform creator labour has become an imperative to thrive and survive within the globalising influencer economies.

Researching cross-platform labour adds to the current knowledge of creators' navigation of globalising social media entertainment. Embracing multiple platforms might be a way to mitigate risks, but it also requires creators to adapt to the changes and multiply their workload, which could further intensify their precarious labour conditions. It shows the constantly evolving platform

⁶⁷ Lin (n 19) 6.

environment and influencer industries that empower individuals but could never secure their creative work. Further research may consider creators' cross-platform labour conditions in the localisation and globalisation of influencer industries.

PART III

Influencers and labour law: A comparative analysis

8. Influencers, labour law and social protection: A comparative analysis between France and the United Kingdom

Claire Marzo

1 INTRODUCTION

Only 2% of the 150,000 influencers in France today earn a very good living.¹ The vast majority of influencers earn less than €1,000 a year.² In the UK, influencers are a booming creative industry that has both disrupted traditional media and reshaped the advertising landscape. According to Vuelio's UK Influencer Survey 2020,³ 49% of influencers have channels that generate revenue for them, and this market could grow from \$6 billion in 2020 to \$24.1 billion by 2025.⁴

The emergence of social media influencers is part of the wider context of the sharing economy, the peer-to-peer networks of the gig economy that have grown spectacularly over the last decade.⁵ In a world where YouTube and Instagram have become the new television, it is imperative to discuss the

¹ See definition of influencer below (section 2).

² 'Influenceurs, influenceuses: mais qui peut vraiment dire ce qu'est l'influence?' (*RadioFrance*, 9 June 2023)

³ Vuelio, UK Influencer Survey 2020' (13 May 2020) <<https://www.vuelio.com/uk/wp-content/uploads/2020/05/UK-Influencer-Survey-2020.pdf?msclkid=1ebf512bb40311eca8438944bb11d42e>> accessed 8 November 2023, 7.

⁴ Market and Markets, 'Influencer Marketing Platform Market' (*M&M*, March 2024) <<https://www.marketsandmarkets.com/ResearchInsight/influencer-marketing-platform-market.asp?msclkid=12e97d6bb40511eca28a18f3ec919d31>> accessed 23 June 2024.

⁵ Jean-Baptiste Viet. *Tous influenceurs: créer des millions de vues sur YouTube, TikTok, Instagram, pour vivre de sa passion* (Eyrolles 2022).

need to regulate social media influencers.⁶ Like digital platform work and microwork, this phenomenon is raising a host of new legal and ethical issues relating to the protection of children and consumers, the advertising practices of influencers and the role of online platforms. Governments and international organisations have been sensitive to these issues. For instance, the US Federal Trade Commission (FTC) has drafted a guide.⁷ The European Union (EU) has also dealt with this question in a directive on unfair commercial practices.⁸ The same trends appear in the UK and France, which we will focus on in this study.

In the UK, a government report to the British Parliament highlights the progress and shortcomings and calls for better regulation. In its response of July 2022, the government envisages a new code of conduct or an amendment to an existing code such as the ISBA code.⁹ It also proposes improved protection for consumers and children: a new law, the Digital Markets, Competition and Consumer Bill, which should soon make it possible to strengthen the powers of the Advertising Standards Authority (ASA) and the Competition and Markets Authority (CMA), the competent authorities.¹⁰

⁶ Catalina Goanta and Sofia Ranchordás (eds), *The Regulation of Social Media Influencers* (Edward Elgar 2020).

⁷ Federal Trade Commission, 'Guide: Disclosures 101 for Social Media Influencers' <<https://www.ftc.gov/business-guidance/resources/disclosures-101-social-media-influencers>> accessed 23 June 2024.

⁸ Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market [2005] OJ L 149 (UCPD); European Parliament, 'Social and professional situation of artists and workers in the cultural and creative sectors' (11 November 2023) <[https://www.europarl.europa.eu/thinktank/en/document/EPRS_ATA\(2023\)754591](https://www.europarl.europa.eu/thinktank/en/document/EPRS_ATA(2023)754591)> accessed 23 June 2024.

⁹ Incorporated Society of British Advertisers (ISBA), 'Influencer Marketing Code of Conduct' (*ISBA*, September 2021) <<https://www.isba.org.uk/knowledge/isba-influencer-marketing-code-conduct-september-2021>> accessed 23 June 2024; Hettie Homewood, 'Lights, camera, finally some action? The future of influencer marketing regulation in the UK' (2023) 45 *Entertainment Law Review* 44.

¹⁰ Advertising Standards Authority (ASA) and the Competition and Markets Authority (CMA). However, the government did reject a number of the DCMS's recommendations (e.g. to commission a market review into the influencer ecosystem and to make amendments to the Online Safety Bill cl.17 and 18 4 to require online platforms to tailor reporting and complaints mechanisms for various types of harm). See Homewood (n 9).

In France, after an initial lack of clarity and a national consultation, legal charters have been created.¹¹ A law has been adopted.¹² Legal loopholes have begun to be filled.¹³ This legislative effort continues and four decrees (*décrets en Conseil d'Etat*) are due to be adopted. One relates to the threshold above which the formalisation of a contract is compulsory for a commercial lobbying operation.¹⁴ Another is about the new powers of the competent authority (DGCCRF), allowing it to strengthen its powers of injunction and penalty payment. The third one gives details of the conditions under which influencers must specify the terms “manipulated images” and “virtual images”. The last one sets the conditions under which influencers based outside the European Union, the European Economic Area and the Swiss Confederation will be required to have a form of legal representation and compulsory professional insurance.¹⁵

One subject that has received less attention is that of employment law and social protection for influencers. Should these content creators be treated as professionals or as consumers? As self-employed workers or as employees? Are influencing, content creation and influencer marketing new types of work? What social protection are these workers entitled to? We will not deal here with questions of private international law and the internationalisation of this profession, which can be practised anywhere and address all communities and

¹¹ See for instance French government, Accor: Charte de collaboration influenceurs, Charte Kid'influenceurs, Charte de la Relation Influenceurs adoptée par le Syndicat du Conseil en Relations Publics (SCRIP), WOÛ – Agence Créative d'Influence Marketing: Charte d'éthique du marketing d'influence <<https://www.economie.gouv.fr/devenir-influenceur-responsable>>; See also on the public consultation: Ministère de l'Économie, des Finances et de la Souveraineté industrielle et numérique, 'Guide de bonne conduite Influence commerciale: L'essentiel de vos droits et devoirs pour votre activité d'influence commerciale' (December 2023) <<https://www.economie.gouv.fr/guide-bonne-conduite-influenceurs-createurs-contenu>> accessed 23 June 2024.

¹² *Loi n° 2023-451 du 9 juin 2023 visant à encadrer l'influence commerciale et à lutter contre les dérives des influenceurs sur les réseaux sociaux.*

¹³ See the website of the ministère de l'Économie, des Finances et de la Souveraineté industrielle et numérique, the ARPP website, the platform terms and conditions, the website of UMICC.

¹⁴ And which will include benefits in kind, i.e. gifts given in return for the operation.

¹⁵ This legislation is set to evolve, particularly in the light of European Union law where proposals are starting to emerge. See Le Figaro 'Bruxelles demande à la France de revenir sur la loi influenceurs et la majorité numérique à 15 ans' (*Le Figaro*, 7 October 2023).

territories.¹⁶ We will limit this analysis to a comparison of French and English law. It is useful to go back to the definition of influencer work and its diversity (2) to understand how influencers are remunerated (3) and what contracts are concluded under which regulation (4). This will allow us to understand what employment and social protection laws apply in France and in the UK (5) in order to draw some conclusions in terms of the future and possible developments in this activity and its legal framework (6).

2 DEFINING INFLUENCER WORK OR CONTENT CREATION

Influencer marketing has been around for decades and involves recruiting people with a high social impact (for example, journalists whose columns in restaurant newspapers are widely read, or celebrities) to advertise products authentically. The emergence of social networks means that people with a large social media audience can endorse a product and advertise it to their many followers, by means of digital word of mouth.¹⁷ Influencers should be distinguished from opinion leaders or popular personalities (politicians, artists) whose job is not directly to “influence”. Quite often, the commercial nature of the influencer’s relationship with companies is the source of the advertising from which they earn income. On top of that, a growing number of people, often without any traditional professional qualifications, are in the business of sharing moments of their daily lives, giving advice in different areas (e.g. fitness, beauty, food) and, in so doing, endorsing consumer goods and services.

One of the challenges of influencer marketing in the digital age is precisely to define it. Influencer marketing is characterised by diversity on a number of levels, such as the sector (fashion, beauty, humour, healthcare, DIY, etc),¹⁸ the

¹⁶ Malo Depincé, ‘Chronique Droit de l’internet. La clause attributive de juridiction est opposable à un influenceur’ T. com. Paris, 29 juin 2022, n° 2021-024529.” *La Semaine juridique*. Entreprise et affaires, no. 3, 2023. For an analysis of private international law and the emerging liability of companies and platforms in the context of microwork but not influencers, although the issues are similar, see Miriam A. Cherry, ‘The Global Dimensions of Virtual Work’ (2010) 54 St. Louis U. L.J. 471, 487 (describing transnational work relationships within video games and in virtual worlds); Miriam A. Cherry and Winifred R. Poster, ‘Crowdwork, Corporate Social Responsibility, and Fair Labor Practices’, in F. Xavier Olleros and Majlinda Zhegu (eds) *Research Handbook on Digital Transformations* (Edward Elgar 2016).

¹⁷ Goanta and Ranchordas (n 6).

¹⁸ Social media influencers appeal to different audiences and focus on different types of content – *Forbes* identified 12 categories in 2017: pets, parenting,

methods used (blogs, vlogs, etc), the audience or popularity (the sum of all subscribers on the main social networks). Beyond these differences, social media influencers share common characteristics, such as the use of social media networks, the production of regular media content and a peer-to-peer engagement with the public on a seemingly non-commercial basis (for example, sharing workouts on YouTube to inspire users rather than to offer services).

According to the French authority on advertising regulation (ARPP),¹⁹ an influencer or content creator (or blogger, vlogger, etc) is an individual who expresses a point of view or gives advice, in writing, audio and/or visual form, in a specific field and according to a style or treatment that is unique to them and identified by their audience. They may act in a purely editorial capacity – outside the scope of professional regulation of advertising – or in collaboration with a brand for the publication of content. A recent French law now offers a legal definition:

someone who operates an activity of commercial influence, in France, is any natural or legal person who, for a fee, mobilises his reputation among his audience to communicate to the public established on French territory, by electronic means, content intended to promote, directly or indirectly, goods, services or any cause whatsoever.²⁰

In the UK a definition has been given by a report drafted by the Digital, Culture, Media and Sport Committee in 2023: “an influencer is an individual content creator who builds trusting relationships with audiences and creates both commercial and non-commercial social media content across topics and genres.”²¹

At the EU level, the Advocate General in the *Kamenova* case noted that “the influencer exercises his or her power over the public and, more specifically, over its community, for the benefit of undertakings owning brands that crystal-

fashion, entertainment, travel, gaming, fitness, beauty, home, food, technology and business, and kids. Forbes, ‘Top Influencers’ (*Forbes*, 2017) <<https://www.forbes.com/top-influencers/#2ed2b38a72dd>> accessed 23 June 2024.

¹⁹ French authority of advertising regulation (*Autorité de régulation professionnelle de la publicité*), <<https://www.arpp.org/>> accessed 23 June 2024.

²⁰ See *Loi n° 2023-451 du 9 juin 2023 visant à encadrer l’influence commerciale et à lutter contre les dérives des influenceurs sur les réseaux sociaux*, *Publiée au Journal Officiel du 10 juin 2023*, and *infra*.

²¹ Digital, Culture, Media and Sport Committee report, ‘Influencer culture: Lights, camera, inaction?’ HC 258, 9 May 2022; available at <https://committees.parliament.uk/publications/22107/documents/164150/default/>.

lise consumer appeal”.²² Each definition has its specificity, but they all share the three main criteria of an online experience, a relationship with an audience and the promotion of activities, services or goods. In this chapter, we will use these criteria to identify influencers. We will also acknowledge that they can have diverse profiles and be remunerated in different ways.

3 DIVERSITY OF PROFILES AND TYPES OF REMUNERATION OR “MONETISATION”

Beyond the uniformity of the definition given above, there is great diversity, ranging from the simple hobby to the true professional. The vast majority of influencers do not earn their living this way, even though they sometimes spend a great deal of time creating videos. Some chosen few, on the contrary, earn fortunes. Influencer marketing gives the impression of a form of “peer-to-peer” or “grassroots” content production, where average individuals who have achieved fame and fortune through their authentic and engaging content, endorse products they actually use and services they believe in. This suggestion is a far cry from the reality of influencer marketing, which is actually monetisation through advertising on social media. In a nutshell, monetisation consists of creating revenue from content published by creators on social media such as YouTube, Instagram, Facebook and blogs.²³

The ways in which influencers are paid can be very diverse. The most important aspect of influencer marketing is the possibility for content creators to monetise their content on social media, but the monetisation techniques are varied. It is important to understand these business models in order to understand how the worker is paid and what status they will be given depending on the existence of a contract or not.

Goanta et al. have proposed grouping the different marketing activities possible on social media into four business models.²⁴ The House of Commons Committee report recognises only the first three.²⁵ These models highlight the

²² Opinion of the Advocate General, C-105/ 17, *Komisija za zaštitu na potrebitelje c/ Evelina Kamenova*, § 51.

²³ Goanta and Ranchordas (n 6).

²⁴ Goanta and Ranchordas (n 6); Frithjof Michaelsen et al., *The impact of influencers on advertising and consumer protection in the Single Market*, Report for the European Parliament, p. 37 <[https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703350/IPOL_STU\(2022\)703350_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703350/IPOL_STU(2022)703350_EN.pdf)> accessed 23 June 2024.

²⁵ UK Digital, Culture, Media and Sport Committee (n 21) at §32. Influencer marketing, whereby a brand or advertiser collaborates with an influencer to market a product or service, is the most common method by which influencers making a living from their online profile. We have identified that there are three main

types of transactions and stakeholders they engage with in order to monetise their content.

The first model used by influencers is affiliate marketing, “an endorsement marketing strategy that pays affiliates (content publishers) when users click on their personalised URLs”.²⁶ The main feature of affiliate marketing is that influencers are paid according to the number of sales or clicks. An example of this business model is any Instagram post that includes a discount code. When such a code is included, the influencer will usually receive a commission for each item purchased with that code. More often than not, a contract has been agreed which sets out advertising obligations for the influencer, as well as payment obligations for the advertiser/vendor/service provider.

These contracts can be signed with companies, agencies or individuals. For example, some influencers, such as Berdah, have one or more companies (Shauna Events and its subsidiary Sublim Talent), while smaller influencers can use the services of an agency that can also represent them in contracts with advertisers. In this business model, affiliate marketing takes the form of product placement, review or promotion, within a contractual framework. For example, it might involve recommending a shampoo²⁷ or a watch.²⁸

business models under which influencers operate in collaboration with brands. These are often referred to collectively as “paid partnership” deals: Endorsement: traditional, paid-for, adverts. Messaging is controlled by the brand or advertiser and disseminated by the influencer in exchange for a payment. These are most often embedded within an influencer’s editorial content to form an ‘advertorial’; Affiliate: a type of endorsement deal where the influencer’s post on social media includes URL links for intermediary organisations which broker a commission for influencers. Influencers are paid on a cost-per-click and/or cost-per-purchase arrangement; Gifting: brands send free or loaned products or services to an influencer in the expectation that they will post a review or endorsement. This expectation may or may not be formalised; Collaborations between influencers and brands can be one-off transactions or take the form of long-term brand ambassador arrangements that last a year or more. According to Ben Jeffries from the influencer marketing agency Influencer.com, the influencer industry is moving towards the latter.

²⁶ Goanta and Ranchordas (n 6) at 9.

²⁷ For instance, the French scandal of a shampoo which made consumers lose their hair; see France Télévisions, ‘Influenceurs: quand le placement de (mauvais) produits fait des dégâts’ (*Franceinfo*, 8 September 2022) <https://www.francetvinfo.fr/internet/reseaux-sociaux/video-influenceurs-quand-le-placement-de-mauvais-produits-fait-des-degats_5349376.html> accessed 23 June 2024.

²⁸ One might have heard of the online war between a French influencer and a rapper; see France Télévisions, ‘Affaire Booba-Berdah: ce qu’a dit l’influenceuse aux enquêteurs dans sa plainte contre le rappeur’ (*Franceinfo*, 8 September

The second model is the exchange of goods and/or services. In this case, the advertising brand offers its goods or services in exchange for an article, review, mention and/or story published by the influencer on their social media, depending on the nature of the industry. This is a very popular form of influencer marketing, which can be initiated by the brand (for example, in the Cannes award-winning film *Triangle of Sadness*, influencers were invited on a cruise), or by the influencer (for example, micro-influencers contacting hotels for free stays). This agreement can be explicit (for example, by signing a contract), or implicit, if the influencer agrees, through their behaviour, to promote the goods/services in a way that benefits the other party, based on negotiations conducted in the private messaging channels of social media platforms.

The third model is “endorsement deals”. These are framework contracts under which influencers receive remuneration in exchange for publicity requested by the brand. In this type of deal, the influencer acts more or less as an ambassador for the brand and is often limited by exclusivity clauses, meaning that he or she must specifically not endorse competing brands.²⁹

Goanta and Ranchordas consider there is a fourth model which reflects more complex commercial transactions, where the influencer becomes a producer/supplier of goods or services themselves, or – depending on how the deal is constructed – collaborates with other companies on guest products. This is the category known as “merchandise”, i.e. branded products that followers buy from the influencer to show their support. In this case, branded products can take many forms. Many influencers create their own brand of products once they have established themselves in a certain market.³⁰ This is the case

2022) <https://www.francetvinfo.fr/internet/reseaux-sociaux/document-france-2-affaire-booba-berdah-ce-qu-a-dit-l-influenceuse-aux-enqueteurs-dans-sa-plainte-contre-le-rappeur_5347276.html> accessed 23 June 2024.

²⁹ A French example about a lawsuit between the payment of an influencer by another one; see Hugo Winterbert, ‘Magali Berdah: deux de ses sociétés condamnées à payer près de 2 millions d’euros aux influenceurs Emma Paris et Vlad Oltean’ (*Vanity Fair France*, 18 January 2023)

³⁰ There have been abuses. The most classic of the dubious practices promoted by influencers is that of “dropshipping”, which consists of taking advantage of one’s reputation to promote a product by proposing that one’s community “pre-order” it. The money raised in this way is used to finance the purchase of stock, and to make a comfortable margin in the process – the influencer doesn’t have to worry about shipping or stock; the supplier does. While the practice is not in itself illegal, it does give rise to frequent abuses, with the quality of the products often being a far cry from that touted by the influencer promoting them – who are themselves sometimes being misled about the product in question by the sup-

of Berdah, for example, who has launched her own company. Others prefer to collaborate with a company to launch a product bearing their name.³¹

These models are based on the marketing of goods and services by influencers, i.e. using the figure of the influencer in the advertising itself and obtaining financial contributions from brands or PR agencies, as well as from their own companies. Some even consider that an influencer is only someone who is paid by a brand.³² This leads to exclude two categories which we feel should be presented. It is useful to take them into account because they also allow us to look at those who have much lower incomes while sometimes providing a significant activity.

What could be seen as a fifth category is when content creators earn money by engaging with platforms or directly with viewers, but without promoting goods and services. The famous AdSense program, owned by Google, enables advertising to be displayed in YouTube videos. This set-up is a way out of marketing. It allows influence to be “de-professionalised”. The purpose of the video is irrelevant, the only thing that counts is the number of views and its potential in terms of the impact of advertising inserted into the medium. A contract is signed with the distribution platform. Here we find a classic model of terms of service, as seen on micro-working platforms and applica-

plier. For example, in 2018, influencer Emma CakeCup (now known as “Emma Paris”, who has 1.7 million followers on Instagram) and her ex-partner Vlad Oltean (1.1 million followers on Instagram) had been accused by several videographers of promoting counterfeit prestige watches. The young woman and her boyfriend at the time announced that they would be suing the video makers for defamation, before retracting their statements before the trial, scheduled for the end of 2020. Emma CakeCup then published several stories in which she claimed to be a victim of deception regarding the products she had promoted. See Samuel Laurent, ‘Influenceurs: une litanie d’affaires autour de leurs pratiques et de leurs promotions’ (*Le Monde*, 27 March 2023)

³¹ This business model raises a number of legal issues as, once again, influencers’ legal obligations are determined by their agreement with the parties whose products they are promoting. In the case where an influencer owns a brand and promotes it amongst other brands, it is not clear in what capacity the influencer is acting – as the CEO of the company, as an advertiser for the company, or as someone completely independent of the company. The same applies to co-created products, particularly if these products are included in an influencer’s normal evaluation activity, which raises numerous ethical questions relating to conflicts of interest – would an influencer ever say something negative about their own products?

³² Ibid.

tions.³³ It is interesting to look at the monetisation rules for YouTube channels to understand how much work influence can represent.³⁴ The conditions of eligibility for the YouTube affiliate program, which require a certain amount of preparation beforehand,³⁵ are difficult to meet: you need to (1) obtain 1,000 subscribers with 4,000 valid viewing hours on public videos over the last 12 months, *or* (2) obtain 1,000 subscribers with 10 million valid views of public shorts over the last 90 days.³⁶ This analysis can be compared with the one we proposed for microworkers.³⁷ Users have no choice but to accept these conditions in order to be able to use the platform.³⁸

Finally, a sixth category includes influencers who choose to generate income from their content using crowdfunding-type platforms such as Patreon, where they can ask their fans for financial subscriptions to unlock original content created by the influencer, who does not need to advertise any product. Platforms such as YouNow even allow you to play with financial contributions: a broadcaster's audience can buy "bars" with real money, and this token can be used to offer "gifts" to a given broadcaster. The latter can in turn convert the gifts into real money. This method might disappear as the host platforms prefer to control the process of monetisation.³⁹ These categories help understand the rights and obligations of the influencer and apply the relevant law in terms of contracts and labour law.

³³ Claire Marzo, 'Perspectives britanniques sur l'appréhension juridique du micro-travail de plateformes', in Emmanuelle Mazuyer, *Regards croisés sur le micro travail de plateforme* (Mare et Martin 2023); Farida Khodri, Emmanuelle Mazuyer, 'Le micro-travail numérique et la force attractive du droit du travail' (2023) 1 *Revue du droit du travail*.

³⁴ YouTube monetisation policies <<https://support.google.com/youtube/answer/1311392>> accessed 23 June 2024.

³⁵ According to YouTube, the conditions are (translation by the author of the rules in French): (1) Comply with the YouTube Channel Monetization Rules. (2) Reside in a country or region where the YouTube Partner Program is available. (3) Not currently be the subject of a warning for non-compliance with community rules. (4) Ensure that two-step validation is enabled for your Google account. (5) Have advanced YouTube functionality. (6) Have an active AdSense account that you link to your channel, or be ready to set one up in YouTube Studio if you haven't already (all you need to do is create an AdSense account in YouTube Studio). See Présentation du Programme Partenaire YouTube et éligibilité <<https://support.google.com/youtube/answer/72851?hl=fr>> accessed 23 June 2024.

³⁶ YouTube <https://www.youtube.com/intl/ALL_fr/howyoutubeworks/policies/overview/> accessed 23 June 2024.

³⁷ See *supra* (n 16).

³⁸ Articles 1119 ff of the French Code civil.

³⁹ Patreon was prohibited by YouTube, see §53 of the report.

4 TOWARDS A LEGAL FRAMEWORK: INFLUENCERS' CONTRACT REGULATIONS

Much could be said about influencers' contracts, their clauses and their legality. From a labour law point of view, it is useful to understand what type of contract the influencer has in order to assess their legal status and social rights.⁴⁰ A couple of years ago it was commonplace for an agreement between a brand owner and an influencer to be formed on the basis of a direct message on the relevant social media platform. However, the industry has since matured, and influencer contracts and formal usage rights are slowly developing. Agencies and legal firms now offer their help to influencers in France and the UK in order to regulate the commercial relationship between the influencer or content creator and the other parties (agency, digital platform, brand client, etc). Like all contracts, influencer contracts are likely to include: the deliverables – how many posts, when should they be posted and in what format (e.g., videos, images or stories); territorial restrictions; advertisement “no-gos” (particularly for regulated or age-restricted products); option to pre-approve the content and the timeline for this; right to take down; the right to repurpose and recirculate content on other channels or accounts; a formal confidentiality obligation in the absence of an employee/employer relationship; and warranties and reasonable limitation of liability.⁴¹ Contracts will generally include intellectual property clauses,⁴² advertising clauses sometimes going beyond the legal requirements which do apply,⁴³ such as the inclusion of hashtags like #Ad and/or using the available paid partnership disclosure tools on social media platforms, depending on the agreement. Care has become necessary and even legally required

⁴⁰ Christophe Caron, ‘Influenceurs et droit des marques’ (2021) 1 Dalloz IP/IT: droit de la propriété intellectuelle et du numérique; Vanessa Bouchara, and Adèle Maier, ‘Les influenceurs peuvent-ils tout se permettre? Du droit à la critique à la promotion de contrefaçons.’ (2021) 66 *Légipresse* 49.

⁴¹ Amy Ralston, ‘Influencer Marketing Rules: CMA enforces consumer protection law’ (*Stephens Scown*, 27 January 2022) <<https://www.stephens-scown.co.uk/intellectual-property-2/influencer-marketing-rules-cma-enforces-consumer-protection-law/>> accessed 23 June 2024.

⁴² The creator of the content (meaning the actual photographer or videographer) will hold the rights to the intellectual property, unless there is an assignment in place. Also, the author's moral rights will give them control over how content is used in the future.

⁴³ Such as limitations on advertising alcohol, children specificities or transparency about sponsored content.

when it comes to consumer protection all over the world.⁴⁴ The UK has issued recommendations, while France adopted legislation on the subject in 2023.

In the UK, the Consumer Protection from Unfair Trading Regulations 2008⁴⁵ include a general duty for businesses to act in a fair and honest way, which extends to the way products are marketed – including ad content on social media and, therefore, to any advertisement by influencers or social media content creators. The Competition and Markets Authority (CMA),⁴⁶ the Committee of Advertising Practice and the Advertising Standard Authority (ASA)⁴⁷ have the power to investigate if they suspect a breach of the Consumer Protection Regulations or a misuse of the “due diligence defence” as well as the applicable consumer protection law. A guide has been drawn up by the CMA.⁴⁸ Above all, a recent report describes the innovations linked to these new professions and the shortcomings of the legislation.⁴⁹ Codes of conduct have also started to appear, such as the ISBA Influencer Marketing Code of Conduct.⁵⁰ In France, a new law, the Evin act, was adopted in 2023.⁵¹

⁴⁴ Marie Malaurie-Vignal, ‘Influenceur, liberté d’expression et protection des consommateurs’ (2023) 11 Dalloz IP/IT: droit de la propriété intellectuelle et du numérique. See the US for instance with the FTC’s Endorsement Guides <<https://www.ftc.gov/business-guidance/resources/ftcs-endorsement-guides-what-people-are-asking>> accessed 23 June 2024.

⁴⁵ UK Unfair Trading Regulations <<https://www.legislation.gov.uk/ukxi/2008/1277/contents/made>> accessed 23 June 2024.

⁴⁶ UK Competition and Markets Authority <<https://www.gov.uk/government/organisations/competition-and-markets-authority>> accessed 23 June 2024.

⁴⁷ Advertising Standards Authority <<https://www.asa.org.uk/>> accessed 23 June 2024.

⁴⁸ CMA, ‘Guidance: Content creators and social media endorsements, Information for content creators on complying with consumer protection law when endorsing products, brands or services on social media, Hidden ads: Being clear with your audience’ (CMA, 3 November 2022).

⁴⁹ UK Digital, Culture, Media and Sport Committee (n 21).

⁵⁰ Ibid at § 2.

⁵¹ The French law adopted in 2023 is a response to an investigation carried out by the Directorate-General for Competition, Consumer Affairs and Fraud Control (DGCCRF) into the commercial practices of influencers since 2021. The findings show that 60% of the influencers inspected did not comply with advertising regulations and were in breach of consumer rights, see Loi n° 2023 (n 20). It follows on from Loi 2019-774 of 24 July 2019 on the organisation and transformation of the healthcare system, which already mentioned influencers. See Oceane Duboust, ‘France has approved a law that targets influencers. What does it mean for social media stars?’ (Euronews, 5 June 2023) <<https://www.euronews.com/next/2023/>>

It provides a definition but does not say much regarding the contract between the influencer and another party. Instead, it focuses on consumer protection.⁵²

Interestingly enough, labour law and social protection do not seem to be at the heart of the preoccupations of the influencers. However, questions of employment law and protection arise, particularly in terms of harassment, diversity and inequality of opportunities and income (for instance in relation to the discriminatory grounds classically mentioned), the role of algorithms (in the remuneration and visibility of posts, and even if we cannot speak of algorithmic management in this case), and finally working time (obligation to post at least regularly, sometimes continuously). The question that needs to be asked is whether they are workers, what their legal status is and what their rights are in terms of employment and social protection.

5 LABOUR LAW AND SOCIAL PROTECTION PERSPECTIVES

Understanding the specificities of their contracts makes it possible to assess the legal status available to the influencers.⁵³ Author, model, artist, content creator, we need to distinguish between influencers who are consumers and those who are professionals – as soon as they exercise a commercial activity according to

06/05/france-has-approved-a-law-that-targets-influencers-what-does-it-mean-for-social-media-star> accessed 23 June 2024.

⁵² It prohibits the promotion of certain practices, such as cosmetic surgery or “therapeutic abstention”. It bans or severely restricts the promotion of a number of medical devices, prohibits the promotion of products containing nicotine, and reminds consumers that they are subject to the “Evin” act – about the regulation of the promotion of tobacco but not alcohol in this case. It also tackles sports betting and games of chance: influencers will no longer be able to promote subscriptions to sports predictions, and the promotion of games of chance and gambling will be restricted to platforms that make it technically possible to prohibit minors from accessing the video. The penalties for non-compliance will be up to two years’ imprisonment and a fine of €300,000. The proposed law also prohibits the depiction of animals whose possession is prohibited. When promotional images, for cosmetics for example, are retouched using a filter to make them more attractive, this will have to be mentioned. See French Government <<https://www.economie.gouv.fr/influenceurs-quels-sont-mes-devoirs>> accessed 23 June 2024; see also Laurent (n 30).

⁵³ In France, see Anaïs Szkopinski, ‘À la recherche d’un statut juridique pour les influenceurs’ (2020) 9 *Dalloz IP/IT: droit de la propriété intellectuelle et du numérique*; Benoît Lopez, ‘Le risque de requalification en contrat de travail d’une prestation d’influenceur’ (2020) 9 *Dalloz IP/IT: droit de la propriété intellectuelle et du numérique*.

UK case law and/or article L121-1 of the French business code.⁵⁴ Beyond, one can separate influencers who have the legal status of freelancers and influencers who own, have or are companies.⁵⁵ After a period of legal uncertainty due to the novelty of the profession, influencers now have a definition and legal obligations.⁵⁶ We will not discuss the issues of legal residence here.⁵⁷ We will also skip the question of the applicable law and competent jurisdiction as well as legality of the action.⁵⁸ We will focus on the key question of the legal status. For the sake of clarity, we will distinguish between French and British law.

In France, some micro-influencers (e.g. on YouTube/category 5 above) who have not yet become professional accept compensation in kind, such as t-shirts or restaurant and hotel invitations. But all income generated by an

⁵⁴ See also Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights [2011] OJ L 304 (Consumer Rights Directive).

⁵⁵ Some influencers – also depending on the industry – will rely on freelance legal forms to gather financial resources through platforms such as Patreon. See *supra*, category 6.

⁵⁶ See *supra*.

⁵⁷ Persons domiciled in France are subject to tax there on all their income, whether from French or foreign sources. Persons domiciled outside France remain liable for tax on their French-source income, subject to the stipulations of the treaty between France and their state of residence. For more information, visit www.service-public.fr and the impots.gouv.fr website, particularly the “International” section.

⁵⁸ The question arises for minors, who will only be allowed to work in certain circumstances. Because more and more minors are being portrayed by influencers, under the law, under-16s will benefit from the protective provisions of employment law governing the employment of minors (such as child models). In essence:

If an influencer is under 16, they can be employed by a company. Prior approval must be obtained from the government, and 90% of the sums they receive through influence will be retained until they reach the age of majority. If the influencer is over 16 and under 18 but without a special French procedure which gives the 16-year-old the rights of an adult called ‘*émancipation*’, the influencer can either set up and manage a one-person company or take over and manage a limited liability company carrying on this activity, with the authorisation of their legal representatives (parents or family council), who will have decision-making power over certain acts, or the influencer may be employed by a company carrying on an activity of commercial influence, provided that their legal representatives (parents or family council) give them authorisation and sign their employment contract. If they are over 16 and have gone through this special procedure of ‘*émancipation*’, they can act as an adult. See French Government <<https://www.economie.gouv.fr/suis-je-influenceur-demarches>> accessed 23 June 2024.

influencer's activity, whether on a primary or secondary basis, is subject to tax, contributions and social security contributions, from the first euro. As soon as remuneration is envisaged, a contract (implicit or explicit, oral or written, via a direct message or via an agency) is entered into.

The classic question of employment status can be raised. An influencer can be an employee if they are employed by a brand, a communications agency or a company.⁵⁹ In this case, there is a subordination link between them and their employer, and the Labour Code applies and governs the employment contract in terms of paid holidays, working hours, collective representation and social security.⁶⁰ An influencer can also be a sole trader and/or attach their influencer activity to their company. In most cases, influencers are self-employed, and as such must be registered (in France with a special status called “*autoentrepreneur*” if they work alone) and/or create a business or company to get a special tax identification number.⁶¹ They are responsible for managing their business, their accounts and their tax and social security obligations. They must declare their benefits to tax and social security authorities and choose under which category they fall. They have three possible options:

First, if the purpose of the content creation activity is to promote goods or services in return for an economic benefit or a benefit in kind, it falls into the taxation category, called “*activités de service – services d’information – influenceur et créateur*” (service activities – information services – influencer and creator). The activity is commercial and the registration is made to the French Trade and Companies Register and the French National Register of Companies. The income is declared as industrial and commercial profits (it is a specific category in France called BIC) and the influencer is affiliated to the independent workers' social security called URSSAF – SSI. Social security contributions cover sickness, maternity, old age, disability and death benefits.

Second, if the purpose of the content creation activity is not to promote goods or services in return for an economic benefit or a benefit in kind, the activity falls into the French taxation category called “*activités de service – services d’information – Community manager, ergonome web, blogueur*”

⁵⁹ Influencers may also be employees or civil servants because they have another activity. In this case, they should check that their main activity is compatible with their influencer activity. For employees in France, see French Government (n 58).

⁶⁰ Articles L1211-1 ff French Labor Code; see also Articles L1231-1 ff French Labor Code.

⁶¹ Articles L1231-1 ff French Code of Commerce. See also <entreprendre.service-public.fr>: one-stop business formalities website (formalites.entreprises.gouv.fr) between one month before starting up and 15 days after starting) and obtaining a SIREN or SIRET number for tax and social security purposes.

professionnel, rédacteur web” (service activities – information services – community manager, web ergonomist, professional blogger, web editor). This is a self-employed activity that requires registration on the French national register of companies only. Income is declared as non-commercial profits (French BNC) and the influencer is affiliated to the same social security as previously (URSSAF-SSI).

Third, If the content creation activity is artistic, it falls into the taxation category called “*Activités de services – Arts, culture et divertissement – Activités créatives, artistiques et de spectacle – Vidéaste, vlogueur, blogueur*” (service activities – arts, culture and entertainment – creative, artistic and performing arts activities – videographer, vlogger, blogger). This is still a self-employed activity that requires registration on the French national register of companies only. Income is declared as French BNC.⁶² The influencer is affiliated, after validation, to the special French social security system for artists and authors.

In all three cases, social rights will be rather similar. Because, in the majority of cases, the person carrying out the activity of commercial influence is a self-employed worker (within the meaning of the social security code), they have a less comprehensive set of rights than an employee. They are entitled to social security, to which they contribute. Their activity as a commercial influencer generates social security rights, but is not equivalent to those of an employee. For example, they may benefit from contributory rights such as retirement if, and only if, they meet specific contributory conditions for entitlement.⁶³ As a self-employed worker, they do not contribute to unemployment insurance and therefore do not receive unemployment benefits. Lastly, they do not have access to the occupational accident and disease (AT-MP) insurance scheme for employees, and do not get the payment of daily allowances. They will therefore have to take out optional insurance if they so wish. The UMICC (*l’Union des Métiers de l’Influence et des Créateurs de Contenu*), a professional federation, was recently set up by the seven biggest French influencer marketing agencies, which represent hundreds of content creators with between 100,000 and 18 million followers on social networks.⁶⁴ The

⁶² Another possibility is that tax is withheld by a third party. A specificity of French law called “*précompte par un tiers diffuseur*”.

⁶³ For more information, see Claire Marzo, *La protection sociale des travailleurs de plateformes* (Cahier Lysias 2024) forthcoming.

⁶⁴ The *Union des Métiers de l’Influence et des Créateurs de Contenu* was set up by Smile Conseil, Bump, Follow, Point d’Orgue, Reech, Influence4You and Spoutnik: “The main players in the market have taken the decision to come together in a single organisation with the aim of setting up a single channel for discussion with the public authorities, representing the sector to the public, proposing the changes and reforms needed to ensure that the influence sector benefits

UMICC is considering requesting the creation of a complementary insurance company for influencers.⁶⁵

In the UK, if the influencer is not a consumer, an employment relationship is deemed to exist if one can identify an employee, a self-employed person or a “worker” – a British third category which does not exist in France. An employee is defined as “an individual who has entered into or works under a contract of employment”.⁶⁶ In contrast, a self-employed person is generally in business on his or her own account and provides services to clients of his or her business.

As a general rule, the British tax authority (His Majesty’s Revenue and Customs – HMRC) requires anyone earning a taxable income to be treated as a business, which means they have to register and pay tax. In the UK, like in France, several statuses are possible. If an influencer receives regular payments from a single company rather than multiple brands, they may be considered an employee. As an employee, the influencer must pay tax and national insurance, an essential part of the UK’s social security system. The employer will also contribute and be liable for several employee’s rights (training, holidays, etc...). In most cases, influencers will be paid by several parties and set up as self-employed persons or sole traders.⁶⁷ If they earn a taxable income (exceeding £1,000 per year), they will submit a self-assessment tax return and pay income tax on their profits and Class 2 and Class 4 National Insurance.⁶⁸ While some influencers prefer to register as a limited company, influencers are more often than not self-employed.⁶⁹

from an environment suited to its development, and educating content creators to help them understand their rights and duties”, states a press release. See <<https://gensdinternet.fr/2023/01/18/7-agences-de-marketing-dinfluence-creent-lumicc-leur-federation-professionnelle/>> accessed 23 June 2024.

⁶⁵ Strategies <<https://www.strategies.fr/actualites/agences/LQ1435056C/lumicc-le-point-dentree-unique-de-linfluence-responsable.html>> accessed 23 June 2024. See also UMICC’s 10 proposals for responsible influence.

⁶⁶ Section 230(1) of the Employment Rights Act 1996.

⁶⁷ UK Government, <<https://www.gov.uk/set-up-sole-trader>> accessed 23 June 2024.

⁶⁸ There are four classes: Class 1 is for employees and Class 3 is for voluntary contributions. Class 2 is for independent workers or self-employed individuals and Class 4 is paid by self-employed individuals with high profits. Class rate for tax year 2023 to 2024: Class 2: £3.45 a week; Class 4: 9% on profits between £12,570 and £50,270, 2% on profits over £50,270. See evolutions on <<https://www.gov.uk/self-employed-national-insurance-rates>> accessed 23 June 2024.

⁶⁹ UK Government <<https://www.gov.uk/limited-company-formation>> accessed 23 June 2024.

In terms of social protection, there has been no need to adapt or specify the situation of influencers, who fall within the existing framework. The National Health Service is for all residents. But a self-employed worker will have fewer employment protections than an employee. For example, they have no protection against dismissal, no right to rest and paid holidays or to a minimum wage. Collective agreements and rights negotiated by a works council do not apply.⁷⁰ Finally, the rights of association and collective bargaining are not used much by those workers, who are usually isolated.

In other digital sectors, and in particular the platform work of Uber drivers, a self-employment contract was transformed into a worker's contract by the UK Supreme Court. This category of "worker" is a third intermediary one which resembles the self-employed status in terms of tax and contribution, but which gives some labour rights to the workers comparable to employees. The *Uber* ruling rendered on 19 February 2021 is striking.⁷¹ One might think that the absence of a contract of employment would prevent someone from being classified as a worker, but the court can interpret the law and the facts in order to make reclassifications. It mainly uses two tests based on reciprocity of obligations between the employer and the worker (the employer must be under an obligation to provide work and the worker must be under an obligation to accept and carry out the work) and the individual's obligation to perform the work personally (without subcontracting).

However, these tests are difficult to apply to digital workers: the influencers are apparently free to connect and disconnect from the application, to accept or refuse a task. Their remuneration is sometimes non-monetary or extremely low, sometimes high. Subcontracting does not seem to be an issue where influencers are concerned (as opposed sometimes to Deliveroo or Glovo delivery drivers). We might add that influencers' workplaces are dematerialised and that their hierarchy can be difficult to identify. As a result, influencers are mostly not considered employees or workers.

Like other freelancers, influencers face problems of income irregularities and the lack of employment protections that go with permanent employment. Another issue, as the sector develops, is the lack of understanding and consensus on standards for determining rates of pay in marketing agreements with brands.⁷² Not only do we see pay inequalities between influencers, but we

⁷⁰ UK Government <<https://www.gov.uk/employment-status/selfemployed-contractor>> accessed 23 June 2024.

⁷¹ *Uber BV and others v Aslam and others*, Case ID: UKSC 2019/0029.

⁷² This appears in other digital fields. See CEPASSOC on platform work (Claire Marzo, Projet N° ANR-20-CE26-001-01, <https://cepassoc.hypotheses.org/>), or microworkers (see DipLab by Antonio Casili and Traplanum by Emmanuelle

also see inequity between the profit of a platform and the lack of income of an influencer who is the cause of the platform's popularity and wealth. To put it another way, while platforms are gaining value from influencers' creative efforts and are aware of the value of influence to their business model, they are not rewarding influencers appropriately and consistently for their work.⁷³

6 CONCLUSIONS

Unlike micro-workers, on the spectrum of new digital professions, influencers have acquired a high profile online, and it quickly became apparent that this profession needed to be regulated. Regulation of the influencer profession is progressing quickly both in France and in the UK. However, in both countries, despite developments particularly in consumer law, advertising law and criminal law, an overall review of labour law and social protection is necessary. We need to rethink the status of workers in this sector. The disconnect between the profits of platforms and the incomes of workers, which has been clearly identified, leads to a feeling of injustice and abandonment by society.

Self-employed workers do not get as satisfactory a social protection as employees. The whole point of the status of employment, which is shrinking with the emergence of digital technology, was to give employers a (social) liability to take care of their employees. Today, because of the difficulty of identifying one employer, this obligation has been diluted and the burden of welfare has been shifted onto the state (also in the context of a failing welfare state) or onto the individual. Social security in the true sense of the word is disappearing. Influencers are one of those new players who are struggling to build themselves decent protection through traditional employment law tools.

Mazuyer) or even subcontracting (<https://www.ohchr.org/en/press-releases/2023/10/amazon-doordash-and-walmart-are-trapping-workers-poverty-un-poverty-expert>). See also UK Digital, Culture, Media and Sport Committee (n 21): While the platforms gain value thanks to the influencers' effort to create and while they understand the value of influencing for their business model, they are not appropriately and consistently rewarding influencers for their work (§58). According to §59: "As part of the market review recommended in paragraph 31, the Government should investigate pay standards and practice in the influencer marketplace. This should encompass the various revenue streams available to influencers, including deals between influencers and third parties as well as revenue sharing mechanisms from the major social media platforms." In addition, power relations between brands and influencers are balanced more firmly towards the brand (§35).

⁷³ UK Digital, Culture, Media and Sport Committee (n 21) at §58.

9. The regulation of influencer labour in India: Situating a novel form of labour amidst colonial continuities of informality

Malcolm Katrak and Shardool Kulkarni

1 INTRODUCTION

India boasts the world's second-highest number of internet users, with its population comprising the largest user base of popular social media platforms such as Instagram, YouTube, Facebook, and WhatsApp.¹ The burgeoning of social media platforms has occurred against the backdrop of a concerted governmental effort to globally position India as a digital power, with an emphasis on fostering the growth of the platform economy.² This phenomenon was accentuated, in no small part, by the availability of inexpensive 4G internet owing to the launch of the mobile network JIO by Reliance Industries Ltd, a company headed by billionaire Mukesh Ambani, with the promise of cheap mobile data attracting several million individuals online for the first time.³

The proliferation of social media has witnessed the “orchestrated commercialization of mundane sociability”, with social interactions between users,

¹ Rahul Mukherjee and Fathima Nizaruddin, ‘Digital Platforms in Contemporary India: The Transformation of Quotidian Life Worlds’ (2022) 9 *Asiascape: Digital Asia* 5, 6.

² Adrian Athique and Vibodh Parthasarathi, ‘Platform Economy and Platformization’ in Adrian Athique and Vibodh Parthasarathi (eds), *Platform Capitalism in India* (Palgrave Macmillan 2020) 1, 2.

³ ‘India’s Internet Explosion: A Manifestation of Network Effects’ (*Cornell Networks Blog*, 13 December 2020) <<https://blogs.cornell.edu/info2040/2020/12/13/indias-internet-explosion-a-manifestation-of-network-effects/>> accessed 23 June 2024.

including strangers, being commodified.⁴ This commodification has led, in turn, to the emergence of influencer marketing, which entails the monetisation of reviews and endorsements of products on social media networks by an influencer, i.e., “a person behind a social media account who creates monetized media content with the goal of exercising commercial or non-commercial persuasion, and that has an impact on a given follower base”.⁵ While official figures on the Indian influencer marketing industry are unavailable, market research reports by private agencies value the influencer industry at approximately \$150 million, with a projected value of \$350 million by 2026. This burgeoning growth is projected to be led mostly by the rise of nano-influencers and micro-influencers.⁶ The regulation of influencers implicates a range of legal issues and has generated a nascent body of literature touching upon aspects such as constitutional protection of free speech by social media influencers, the regulation of child influencers or “kidfluencers”,⁷ the issues arising out of workers operating as social media influencers for their employers,⁸ and

⁴ Adrian Athique, ‘Integrated Commodities in the Digital Economy’ (2020) 42(4) *Media, Culture & Society* 554, 556.

⁵ Catalina Goanta and Giovanni de Gregorio, ‘Content Creator/Influencer’, in Luca Belli, Nicolo Zingales and Yasmin Curzi (eds), *Glossary of Platform Law and Policy Terms* (FGV Direito Rio 2021) 69–71.

⁶ Jones Mathew, ‘The rise of micro-influencers and how they can help brands connect with target audience’ (*Financial Express*, 24 February 2024) <<https://www.financialexpress.com/business/brandwagon-the-rise-of-micro-influencers-and-how-they-can-help-brands-connect-with-target-audience-3404021/>> accessed 23 June 2024; Naini Thaker and Kunal Sawant, ‘Digital stars 2023: Rise of the influencer’ (*Forbes India*, 26 October 2023) <<https://www.forbesindia.com/article/digital-stars-2023/digital-stars-2023-rise-of-the-influencers/89235/1>> accessed 23 June 2024, for a list of top Indian content creators in different categories.

⁷ Gavin Fellers and Benjamin Burroughs, ‘Branding Kidfluencers: Regulating Content and Advertising on YouTube’ (2022) 23(6) *Television & New Media* 575; Simone van der Hof and others, ‘The Child’s Right to Protection against Economic Exploitation in the Digital World’ (2020) 28 *International Journal of Children’s Rights* 833; Erin E. O’Neill, ‘Influencing the Future: Compensating Children in the Age of Social-Media Influencer Marketing’ (2019) 72 *Stanford Law Review Online* <<https://www.stanfordlawreview.org/online/influencing-the-future/>> accessed 23 June 2024.

⁸ David Mangan, ‘Influencer Marketing as Labour: Between the Public and Private Divide’, in Catalina Goanta and Sofia Ranchordás (eds), *The Regulation of Social Media Influencers* (Edward Elgar 2020) 185.

disclosures regarding advertising and sponsorship, particularly in the context of unfair trade practices and consumer protection law.⁹

Much of the aforementioned literature focuses on the Global North, with an analysis of the regulation of influencer labour in India constituting a considerable gap in the extant literature. The limited emerging scholarly work primarily deals with the regulation of financial influencers or “finfluencers”, concerning disclosures and disclaimers for bolstering investor protection,¹⁰ mirroring the existing regulatory approach in India. The heightened regulatory attention that the obligations of influencers, concerning issues of consumer protection and unfair commercial practices arising from influencer marketing, have begun to receive stands in sharp contrast to the treatment of their rights and the conceptualisation of influencer marketing as work. For instance, in 2020, the Indian government banned TikTok, in the wake of military clashes between India and China¹¹ – a move that has come under criticism for depriving numerous working-class influencers of their livelihood.¹²

Arguably, the failure to meaningfully regulate influencer labour, in a manner that accounts for its precarity and the power dynamics that exist between influencers and social media platforms, could, at first blush, be brushed off as a mere failure to grapple with novel forms of work. The phenomenon of influencer marketing has been situated within the broader framework of peer-to-peer services and the platform economy,¹³ with courts and policy-makers attempting to address policy gaps and legal loopholes after “years of

⁹ Rossana Ducato, ‘One hashtag to rule them all? Mandated disclosures and design duties in influencer marketing practices’ in Catalina Goanta and Sofia Ranchordás (eds), *The Regulation of Social Media Influencers* (Edward Elgar 2020) 232. For an overview of the emerging literature on the regulation of influencers, see Catalina Goanta and Sofia Ranchordás (eds), *The Regulation of Social Media Influencers* (Edward Elgar 2020).

¹⁰ See, Kirthana Singh Khurana, ‘Finfluencers as Investment Advisors – Time to Rein Them In?’, in Soham De and others (eds), *Social Media and Society in India* (University of Michigan 2023) 109.

¹¹ Anilesh Kumar and Daya Thussu, ‘Media, Digital Sovereignty and Geopolitics: The Case of the TikTok Ban in India’ (2023) 45(8) *Media, Culture, & Society* 1583.

¹² Nitish Pahwa, ‘What Indians Lost When the Government Banned TikTok’ (*The Wire*, 18 August 2020) <<https://thewire.in/tech/india-tiktok-ban-government>> accessed 23 June 2024.

¹³ Catalina Goanta and Sofia Ranchordás, ‘The Regulation of Social Media Influencers: An Introduction’, in Catalina Goanta and Sofia Ranchordás (eds), *The Regulation of Social Media Influencers* (Edward Elgar 2020) 1, 3.

perilous doublespeak and uncertain litigation”.¹⁴ However, it has been argued that although the technology utilised by the platforms is certainly novel, the same cannot be said insofar as work is concerned, with the defining features of the platform economy, i.e., the presence of a large workforce subjected to poor working conditions and the control of powerful intermediaries, being emblematic of practices that have been entrenched in the labour market for centuries.¹⁵ In India, the State’s approach towards influencer labour needs to be seen in the context of pervasive informality that characterises the nature of work. While more than 90 per cent of India’s workforce comprises informal workers, it is the formal sector that has generally enjoyed the protection of labour law.¹⁶ The size of the formal sector is arguably attributable to the Indian labour law framework, which does not account for forms of work beyond the standard employment relationship – a phenomenon whose roots lie in the colonial history of Indian labour law.¹⁷ Labour law in independent India, thus, is marked by a “colonial continuity”,¹⁸ despite an explicit constitutional mandate for socioeconomic justice.

This chapter seeks to situate the regulation of influencer labour in India within this colonial continuity. To that end, section 2 of the chapter traces the evolution of labour law in India, providing an overview of the history of exclusions that has shaped it from the colonial era up to the present day. In particular, it highlights the non-realisation of the rights identified in the International Labour Organization’s (ILO) Declaration on Fundamental Principles and Rights at Work (DFPRW), which are considered universally applicable regardless of employment status, despite the explicit constitutional commitment towards socioeconomic justice.¹⁹ Section 3 goes on to map the

¹⁴ Antonio Aloisi, ‘Platform Work in Europe: Lessons Learned, Legal Developments and Challenges Ahead’ (2022) 13(1) European Labour Law Journal 4, 25.

¹⁵ Jeremias Prassl, *Humans as a Service: The Promise and Perils of Work in the Gig Economy* (OUP 2018) 72–73.

¹⁶ Kamala Sankaran, ‘Labour Laws in South Asia: The Need for an Inclusive Approach’ (2007) ILO Discussion Paper No. 176, 4 <https://www.ilo.org/public/libdoc/ilo/2007/107B09_170_engl.pdf> accessed 23 June 2024.

¹⁷ Simon Deakin, Shelley Marshall and Sanjay Pinto, ‘Labour Laws, Informality, and Development: Comparing India and China’ (2020) Centre for Business Research, University of Cambridge Working Paper No. 518, 15.

¹⁸ Kamala Sankaran, ‘Transition from the Informal to the Formal Economy: The Need for a Multi-faceted Approach’ (2022) 65 Indian Journal of Labour Economics 625, 631.

¹⁹ Kamala Sankaran, ‘Fundamental Principles and Rights at Work: India and the ILO’ (201) 46(10) Economic and Political Weekly 68, 73.

existing regulatory landscape for influencers in India, concerning the recent regulations and proposals as well as the applicability of Indian labour law to influencers. It argues that the approach towards influencer labour is emblematic of the informality of India's workforce, rather than merely constituting a failure to fully grapple with a novel form of work. Section 4 provides some concluding remarks.

2 A BRIEF HISTORY OF EXCLUSIONS

India's existing labour law framework is highly complex and fragmented, with over 40 central legislations and 160 state legislations.²⁰ However, as mentioned earlier, the vast majority of its workforce remains outside the purview of the protection of these laws. The emergence of labour law in India was concurrent with industrialisation,²¹ with the principle animating the evolution of labour law in the colonial era being "rationalisation" of the law to fulfil the capitalistic "need for unity, order and consistency".²² The earliest 19th-century British legislations, such as the Factories Acts – which ostensibly constituted interventions seeking to assuage concerns about exploitative working conditions²³ – arguably continued the process of rationalisation in pursuit of creating an efficient working-class population.²⁴

²⁰ Trilok Singh Papola, 'Role of Labour Regulation and Reforms in India: Country Case Study on Labour Market Segmentation' (2013) International Labour Office, Employment Sector, Employment Working Paper No. 147, 10 <https://www.ilo.org/wcmsp5/groups/public/---ed_emp/---ifp_skills/documents/publication/wcms_232497.pdf> accessed 23 June 2024. Although Papola notes that there are 54 legislations at the central level, the Ministry of Labour and Employment cites the current number as 40 legislations. See 'List of Enactments in the Ministry' (*Ministry of Labour and Employment*) <<https://labour.gov.in/list-enactments-ministry>> accessed 23 June 2024.

²¹ Sankaran (n 18), 630.

²² Valerian DeSouza, 'Modernizing the Colonial Labour Subject in India' (2010) 12(2) CLC Web: Comparative Literature and Culture 4 <<http://docs.lib.purdue.edu/clcweb/vol12/iss2/3>> accessed 23 June 2024.

²³ Adwitiya Mishra and Aasheerwad Dwivedi, 'Labour Laws in India: History, Evolution and Critical Analysis' (2023) Labor History 3 <<https://doi.org/10.1080/0023656X.2023.2280051>> accessed 23 June 2024. See also, the Factories Act 1881, which was subsequently amended by the Factories Act 1891. Both of these statutes were repealed by the Factories Act 1911.

²⁴ Richard Mitchell, Petra Mahy and Peter Gahan, 'The Evolution of Labour Law in India: An Overview and Commentary on Regulatory Objectives and Development' (2014) 1 Asian Journal of Law and Society 413, 415.

After the First World War, in the 1920s, the regulatory landscape was shaped by the growing momentum of the Indian nationalist movement, the rapid growth of trade unions, especially the establishment of the All-India Trade Union Congress (AITUC) in 1920, the increasing communist influence on the labour movement, and the establishment of the ILO.²⁵ For instance, the Trade Unions Act in 1926 provided legal recognition to trade unions for the first time.²⁶ While this was considered a welcome move, subsequent acts concerning unions, such as the Trade Disputes Act in 1929, came under particularly heavy criticism from the trade union movement for stifling the right to strike and collective bargaining.²⁷ In 1929, in the wake of growing economic depression, and resultant unemployment and industrial agitation, the colonial government appointed the Royal Commission on Labour in India.²⁸ Despite the Commission being effectively boycotted by the Indian labour movement,²⁹ 19 of the 25 legislative enactments about labour between 1932 and 1937 were based on its recommendations.³⁰ The bulk of these were protective enactments concerning workers in mines and factories.³¹ Thus, the colonial regime only regarded certain forms of industrial work as constituting labour, and agriculture, household-based establishment and other forms of self-employment remained outside the purview of labour law,³² and, thereby, came to constitute India's sizeable informal sector.

This conflation of labour and industrial law continued after the Second World War, and even after India gained its independence in 1947. During the Second World War period, regulation at both the central and provincial levels aimed at quelling industrial unrest and ensuring the cooperation of labour in the war effort.³³ Yet, even after the Second World War, the Bombay Industrial Relations Act in 1946 continued this restrictive approach, and went on to

²⁵ Deakin, Marshall and Pinto (n 17) 11.

²⁶ Mishra and Dwivedi (n 23) 3; Trade Unions Act 1926.

²⁷ See, T.C.A. Anant and others, 'Labor Markets in India: Issues and Perspectives' in Jesus Felipe and Rana Hasan (eds), *Labor Markets in Asia: Issues and Perspectives* (Palgrave Macmillan 2006) 205; Trade Disputes Act 1929.

²⁸ Mitchell, Mahy and Gahan (n 24) 417.

²⁹ Ibid.

³⁰ V.K.R. Menon, 'The Influence of International Labour Convention on Indian Labour Legislation' (1956) 73 (6) *International Labour Review* 551, 557.

³¹ Deakin, Marshall and Pinto (n 17) 12.

³² Sankaran (n 18) 630.

³³ Mitchell, Mahy and Gahan, (n 24) 419. For instance, in 1941, the insertion of s 49A in the Bombay Industrial Disputes Act 1938 empowered the provincial government to make references to mandatory arbitration. It banned any strikes or lock-outs before the arbitration process.

become the template for the Industrial Disputes Act in 1947 (IDA), which remains in force today.³⁴ The IDA adopted a narrow definition of “workman”, which excluded the bulk of the Indian workforce.³⁵ Sankaran notes that the present application of labour laws to only the formal sector can be traced back to the “social compact” underlying industrialisation in India after it became independent, with the legal framework sustaining this social compact including the IDA, the Industrial Employment (Standing Orders) Act 1946, and the Employees State Insurance Act 1948.³⁶

The question of who could be counted as a workman animated much of the labour legislation in the mid-20th century, with rights and protections being persistently denied to vulnerable workers, including piece-rate workers and home-based female workers, who fell outside the definitional boundaries of these enactments.³⁷ Although only 6 per cent of the total workforce during this period of industrial workers enjoyed the protection of labour laws, these workers were seen as “the prototype of the labour force that was to determine the future of land and people”.³⁸ The binary between formal and informal sectors originated in the colonial era. However, the postcolonial State viewed informality as a “waiting room”, with the idea being that the workforce would gradually be transitioned into the formal sector with increasing industrialisation and economic growth.³⁹

The Indian freedom movement was concerned not only with political freedom but also with the alleviation of poverty for both the industrial and

³⁴ Ibid.

³⁵ See Industrial Disputes Act 1947, s 2(s), which defines “workman” as “any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward...”.

³⁶ Kamala Sankaran, ‘Flexibility and Informality of Employment Relationships’, in Judy Fudge, Shae McCrystal and Kamala Sankaran (eds) *Challenging the Legal Boundaries of Work Regulation* (Hart 2012) 29, 32–33.

³⁷ Karuna Dietrich Wielenga, ‘The Emergence of the Informal Sector: Labour Legislation and Politics in South India, 1940–60’ (2020) 54(4) *Modern Asian Studies* 1113, 1140.

³⁸ Jan Breman, ‘Industrial Labour in Post-Colonial India I: Industrializing the Economy and Formalizing Labour’ (1999) 44 *International Review of Social History* 249, 251.

³⁹ Jan Breman, ‘A Mirage of Welfare: How the Social Question in India got Aborted’ in Jan Breman and others (eds), *The Social Question in the Twenty-First Century: A Global View* (University of California Press 2019) 98, 104.

the rural population.⁴⁰ The text of the Constitution of India also reflected this commitment in the form of Part III, providing a catalogue of “Fundamental Rights”, which are essentially justiciable civil-political rights, and Part IV, enumerating the “Directive Principles of State Policy” (DPSPs), which reflect non-justiciable and progressively realisable socioeconomic ideals.⁴¹ The DPSPs, though non-justiciable, are nonetheless “fundamental in the governance of the country”, with it being the duty of the State to “apply these principles in making law”.⁴² They include, *inter alia*, the right to adequate means of livelihood, equality of pay, preventing the abuse of the health of workers, especially children, the right to work, just and humane conditions of work and maternity relief, and the right to a living wage.⁴³ In furtherance of these socioeconomic ideals, the early postcolonial period witnessed a spate of legislation aimed at decasualising informal workers from specific sectors, such as the Contract Labour (Regulation & Abolition) Act in 1970. However, most of the legislative enactments on social security applied only to the formal sector,⁴⁴ inevitably reinforcing the binary between the formal and informal sectors generated by the colonial regime. While the IDA did undergo a series of pro-worker amendments,⁴⁵ the safeguards merely strengthened the formal sector, resulting in a languishing informal sector. Industrialisation in the post-independence era did not occur as swiftly as anticipated and, thus, the “waiting room” of informality became “an end station for the swelling workforce locked up in it”.⁴⁶

In 1991, the government embarked upon a structural adjustment programme that necessitated economic liberalisation, in exchange for assistance from the IMF and the World Bank.⁴⁷ This new policy invariably entailed a shift to

⁴⁰ Madhav Khosla, *India's Founding Moment: The Constitution of a Most Surprising Democracy* (Harvard University Press 2020) 44–46.

⁴¹ Madhav Khosla, ‘Making Social Rights Conditional’ (2010) 8(4) *International Journal of Constitutional Law* 739, 744.

⁴² Constitution of India, art 37. For a detailed discussion on the role of DPSPs in constitutional interpretation, see Gautam Bhatia ‘Directive Principles of State Policy’ in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* 644–661.

⁴³ Constitution of India, arts 39(a), 39(d), 39(e), 41, 42, 43.

⁴⁴ Sankaran (n 36) 33.

⁴⁵ See, Industrial Disputes Act 1947, ss 25M(1) and 25N(1), which were inserted by the Industrial Disputes (Amendment) Act 1976.

⁴⁶ Bremen (n 39).

⁴⁷ Ajeet N. Mathur, ‘The Experience of Consultation during Structural Adjustment in India (1990–92)’ (1993) 132 (3) *International Labour Review* 331, 333.

a less regulated labour market.⁴⁸ Reports by the Commissions set up by the government reintroduced the notion of rationalisation for the first time since independence,⁴⁹ buttressing the significance of organisational flexibility,⁵⁰ and essentially recommending employers be allowed to retrench and lay off at will subject to payment of compensation.⁵¹ Despite such recommendations, labour law reform was effected through a policy of “reforms by stealth”, rather than sweeping legislative changes.⁵² However, although the legislative framework remained largely intact, there was a pronounced pro-employer shift in court decisions during this period.⁵³

While the discourse on perceived overregulation in the formal economy took centre stage, the increase in employment in the formal sector post-liberalisation was like informal forms of employment within the formal sector, such as casual or contract labour,⁵⁴ reflecting a structuralist conceptualisation of informality.⁵⁵ Due to the abysmal condition of workers in the informal economy, the Parliament of India enacted the Unorganised Workers’ Social Security Act in 2008 (UWSSA), intending to provide social security benefits to workers in the informal sector.⁵⁶ However, the Act came under heavy criticism for, *inter*

⁴⁸ Mitchell, Mahy and Gahan, (n 24) 426.

⁴⁹ See, for instance, *Report of the National Commission on Labour – Volume I* (Ministry of Labour, Government of India 2002) 6, 10.

⁵⁰ Ibid, 364.

⁵¹ Anamitra Roychowdhury, *Labour Law Reforms in India: All in the Name of Jobs* (Routledge 2018) 2–4.

⁵² Mishra and Dwivedi (n 23) 3. For a detailed discussion on the “reforms by stealth” undertaken between 1998 and 2004, see Rob Jenkins, ‘Labor Policy and the Second Generation of Economic Reform in India’ (2004) 3 (4) *India Review* 333.

⁵³ See Santanu Sarkar, ‘How Independent is India’s Labour Law Framework from the State’s Changing Economic Policies?’ (2019) 30 (3) *Economic and Labour Relations Review* 422.

⁵⁴ Sankaran (n 36), 31.

⁵⁵ The structuralist theory argues that the formal and informal economies are interconnected, with the informal economy constituting a part of the production process employed by the formal economy. See Supriya Routh, ‘Building Informal Workers Agenda: Imagining “Informal Employment” in Conceptual Resolution of Informality’ (2011) 2 (3) *Global Labour Journal* 208.

⁵⁶ Paromita Goswami, ‘A Critique of the Unorganised Workers’ Social Security Act’ (2009) 44 (11) *Economic and Political Weekly* 17. See, National Commission for Enterprises in the Unorganised Sector, *Report on Conditions of Work and Promotion of Livelihoods in the Unorganised Sector* (Dolphin Printo Graphics 2007) 202, which suggested the passing of social security laws for the informal sector workforce.

alia, merely putting together existing schemes without the addition of new benefits, not providing a dispute resolution or enforcement mechanism, and accounting for only three of the nine contingencies provided for by the ILO Convention No. 102 on minimum standards on social security.⁵⁷ This resulted in scholars describing the UWSSA as a “dysfunctional Social Security Law for unorganised workers”,⁵⁸ as it did little to extend the safeguards of labour law to the informal sector workforce.

In 2014, the Bhartiya Janta Party, led by Prime Minister Narendra Modi, became the first party to secure a full majority in the central elections since 1984. The initial set of proposed reforms introduced by this government sought to whittle down the applicability of existing formal sector regulation for factories and other industries.⁵⁹ In 2016, an amendment to the Child Labour (Prohibition) Act in 1986 allowed children below the age of 14 to work in family enterprises as well as the entertainment industry.⁶⁰ This process of dilution of labour laws took place against the backdrop of a broader government policy to encourage domestic manufacturing through the Make in India campaign, under which the Startup India initiative was launched.⁶¹ Under this initiative, startups were exempted from labour inspections for an initial three-to five-year period while also being allowed to self-certify themselves with respect to labour law compliances.⁶² Reforming the existing labour law framework was seen as a critical step in the overarching attempt to create a favoura-

⁵⁷ K.B. Saxena, ‘The Unorganised Workers’ Social Security Act 2008: A Critique’ 39 (2) Social Change 281.

⁵⁸ Kathyayini Chamaraj, ‘A Dysfunctional Social Security Law for Unorganised Workers’ (2019) Civic Discussion Paper <<https://civicspace.in/wp-content/uploads/2019/10/Revised-A-Dysfunctional-Social-Security-Law-for-Unorganised-Workers-Analysis-and-Recommendations-22.1.16-1.pdf>> accessed 23 June 2024.

⁵⁹ See generally Factories (Amendment) Bill 2014, which sought to increase the threshold of applicability of the Factories Act 1948 and increasing working hours and overtime limits. See also Small Factories (Regulation of Employment and Conditions of Services) Bill, 2014, which exempted industries employing fewer than 40 workers from complying with 14 labour statutes.

⁶⁰ Child Labour (Prohibition and Regulation) Act 1986, s3, which was substituted for the original provision by the Child Labour (Prohibition and Regulation) Amendment Act 2016.

⁶¹ Ministry of Commerce and Industry, Government of India, ‘Startup India Programme’ (*Press Information Bureau*, 25 July 2016) <<https://pib.gov.in/newsite/PrintRelease.aspx?relid=147661>> accessed 23 June 2024.

⁶² Deepak Patel, ‘Regarding 6 Laws: PMO Directs LabourMin to Ensure Self-certification System for Start-ups’ (*The Indian Express*, 15 August 2017) <<https://indianexpress.com/article/business/companies/regarding-6-laws-pmo>>

ble regulatory environment for technology-based entrepreneurship and foreign investment. To that end, in 2019 and 2020, the Parliament of India repealed 29 central labour legislations and consolidated the same into four new codes, namely, the Code on Wages 2019 (CoW), the Industrial Relations Code (IRC), the Occupational Safety, Health, and Working Conditions Code (OSHWCC), and the Code on Social Security (CSS).⁶³ However, these Codes, which are yet to come into force, have come under increasing criticism for diluting, rather than strengthening, pre-existing labour safeguards.⁶⁴ Significantly, the persistent exclusion of informal workers from the purview of formal labour laws continues under the new Codes, with only the CSS providing some limited protection to these workers. Despite most of the provisions of the CSS being recommendatory, it has been criticised for effectively replicating the failings of the UWSSA.⁶⁵

The emphasis on perceived overregulation in the formal sector has shifted attention away from the effective non-realisation of labour rights recognised as fundamental by the ILO.⁶⁶ In furtherance of its decent work agenda, the ILO DFPWR recognises five categories of labour standards: (i) the freedom of association and the effective recognition of collective bargaining, (ii) the elimination of all forms of forced or compulsory labour, (iii) the effective abolition of child labour, (iv) the elimination of discrimination in all forms of employment, and (v) a safe and healthy working environment.⁶⁷ These five standards are captured in 11 fundamental instruments – 10 conventions and one protocol

-directs-labourmin-to-ensure-self-certification-system-for-start-ups-4796936/> accessed 23 June 2024.

⁶³ Ministry of Information and Broadcasting, 'New Labour Code for New India: Biggest Labour Reforms in Independent India' (*Ministry of Labour and Employment*, 2021) <<https://static.pib.gov.in/WriteReadData/specificdocs/documents/2021/nov/doc202111101.pdf>> accessed 23 June 2024.

⁶⁴ Mani Mohan and others, 'Ushering Thin Welfare Regimes at the Cost of Thick Labour Jurisprudence: A Tale of New Labour Codes in India' (2021) 4 *Revue de droit comparé du travail et de la sécurité sociale* 38 <<https://journals.openedition.org/rdctss/2633>> accessed 23 June 2024.

⁶⁵ Rajrishi Ramaswamy and Anuradha Binnuri, 'An Analysis of the Impact of India's Labour Codes on its Organized and Unorganized Sectors' (2023) 9 *Cogent Social Sciences* <<https://doi.org/10.1080/23311886.2023.2238458>> accessed 23 June 2024.

⁶⁶ Aditya Bhattacharjea, 'Labour Market Flexibility in Indian Manufacturing: A Critical Survey of the Literature' (2021) 160 (2) *International Labour Review* 197, 214–215.

⁶⁷ ILO Declaration on Fundamental Principles and Rights at Work (adopted on 18 June 1998), as amended on 11 June 2022.

– with Member States having an obligation to “respect, promote and realise in good faith, the principles concerning the fundamental rights” regardless of whether they had ratified the conventions in question.⁶⁸ The DFPRW refers to “rights at work” as opposed to “worker rights” and, consequently, the rights articulated therein are human rights as they apply at work, regardless of employment status.⁶⁹ However, despite the freedom of association⁷⁰ and the prohibition of discrimination,⁷¹ child labour in hazardous industries⁷² and forced labour⁷³ being enshrined as fundamental rights in the Constitution of India, India has ratified only six of the 11 fundamental instruments.⁷⁴ Sankaran argues that the failure to ratify these instruments is due to the constitutionally guaranteed fundamental rights being subject to a range of exceptions and caveats, which do not align with the DFPRW. For instance, the failure to ratify conventions concerning collective organisation has been attributed to the restrictions on public servants and members of the armed forces with respect to unionising.⁷⁵ Rather than amending legislation that does not comply with the fundamental instruments identified by the DFPRW, the Indian government has simply opted to not ratify the instruments, with the decent work agenda being rendered largely nugatory concerning the informal workforce.⁷⁶

Informality is characterised not by the absence of an employment contract but, rather, by the vulnerability arising owing to the lack of legal safeguards.⁷⁷

⁶⁸ Ibid.

⁶⁹ Janice R. Bellace, ‘The ILO Declaration of Fundamental Principles and Rights at Work’ (2001) 17 *International Journal of Comparative Labour Law and Industrial Relations* 269, 274.

⁷⁰ Constitution of India, art 19 (1) (c).

⁷¹ Constitution of India, art 15.

⁷² Constitution of India, art 24.

⁷³ Constitution of India, art 23.

⁷⁴ India has not yet ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), Right to Organise and Collective Bargaining Convention, 1949 (No. 98), Occupational Safety and Health Convention, 1981 (No. 155), Promotional Framework for Occupational Safety and Health Convention, 2006 (No. 187), or the Protocol of 2014 to the Forced Labour Convention, 1930. See ‘Up-to-date Convention and Protocols not ratified by India’ (*International Labour Organisation*), <https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11210:0::NO::P11210_COUNTRY_ID:102691> accessed 23 June 2024.

⁷⁵ Sankaran (n 19) 72–73.

⁷⁶ Jens Lerche, ‘Labour Regulations and Labour Standards in India: Decent Work?’ (2012) 3 (1) *Global Labour Journal* 16, 23.

⁷⁷ Kamala Sankaran, ‘Informal Employment and the Challenges for Labour Law’ in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (OUP 2011) 223, 226.

In the Indian context, this informality is not perpetuated “in the shadow of the state”, i.e., it does not exist outside institutional boundaries, but, instead, is arguably perpetuated by the State’s policies and practices.⁷⁸ The narrative of rationalisation to promote industrialisation underscored the evolution of Anglo-Indian labour law, with the impact of the labour law framework emerging in the colonial and immediate post-Second World War period being that of “limitation and exclusion”.⁷⁹ In independent India, labour continued to be conflated with industrial work,⁸⁰ with legal reform in furtherance of the constitutional commitment to socioeconomic justice focusing on the formal workforce. The move towards a less regulated labour market after liberalisation has also primarily concerned itself with diluting labour law safeguards in the formal economy. This enduring regulatory focus on the formal sector and the standard employment relationship has resulted in a “colonial continuity” within the labour law framework,⁸¹ which fails to reflect the reality of work in India.

3 THE REGULATION OF INFLUENCER LABOUR AND THE CONTINUITY OF INFORMALITY

The lack of safeguards in the informal economy impacts not only wage workers but also self-employed workers, who make up 52 per cent of India’s workforce.⁸² While much of this self-employment is disguised wage work,⁸³ in a broader sense, genuine self-employment may be understood as being characterised by: (i) autonomy, i.e., the lack of subordination, managerial control and organisational integration, (ii) economic independence, i.e., a plurality of customers and equality of bargaining power, and (iii) personal provision of

⁷⁸ Alessandra Mezzadri, ‘Globalisation, Informalisation and the State in the Indian Garment Industry’ (2010) *International Review of Sociology* 20 (3) 491, 492.

⁷⁹ Mitchell, Mahy and Gahan, (n 24) 419.

⁸⁰ Jan Bremen, ‘Industrial Labour in Post-Colonial India I: Industrializing the Economy and Formalizing Labour’ (1999) 44 *International Review of Social History* 249.

⁸¹ Sankaran (n 18).

⁸² T.S. Papola and K.P. Kannan, ‘Towards an India Wage Report’ (2017) ILO-Asia Working Paper Series, 29 <https://www.ilo.org/wcmsp5/groups/public/-/asia/---ro-bangkok/---sro-new_delhi/documents/publication/wcms_597270.pdf> accessed 23 June 2024.

⁸³ *Ibid.*

service, i.e., the work is directly by the individual.⁸⁴ The pervasive informality that has been engendered by the evolution of labour law in India, thus, affects both wage workers and those engaged in genuine self-employment. Ostensibly, novel forms of work, such as labour in the sharing economy, have been beleaguered by issues such as “low wages, tax evasion, no social security rights, and regulatory uncertainty”⁸⁵ – issues that, in India, pre-date the emergence of these forms of work and have been shaped by the aforementioned colonial continuities. As mentioned earlier, social media influencers may be said to operate within the broader framework of the emerging phenomenon of the sharing and platform economy.⁸⁶ However, as this section will demonstrate, their regulatory treatment is not emblematic of a failure to grapple with the business models of social media platforms, but, rather, represents a continuity in the perpetuation of informality by the Indian State.

Social media influencers operate outside the boundaries of an employment contract, are ordinarily not integrated into the organisational structures of their clients, and perform work personally.⁸⁷ The activities of social media influencers, apart from involving the direct labour of marketing or advertising, may be viewed as also constituting immaterial labour, i.e., activities that do not resemble traditional work but have been effectively commodified.⁸⁸ While consumers and small influencers may consider immaterial labour as a creative expression, with “passion” and “fun” being dominant tropes, there is nonetheless an underlying “hope” that the visibility and exposure might benefit in the long run.⁸⁹ Keuhn and Corrigan describe this as “hope labour”, where the work carried out in the present is uncompensated, but may result in experience

⁸⁴ Nastazja Potocka-Sionek, ‘Platformisation of work: Challenges beyond employment classification’ (PhD Thesis, European University Institute 2023) 198–202.

⁸⁵ Sofia Ranchordás, ‘The Risks and Opportunities of the Sharing Economy’ (2016) 7(4) *European Journal of Risk Regulation* 650.

⁸⁶ Goanta and Ranchordás (n 13) 1, 3.

⁸⁷ The issue of personal provision of service is blurred with respect to self-employed individuals who are assisted by their family members. See Jayesh Rathod and Michal Skapski, ‘Reimagining the Law of Self-employment: A Comparative Perspective’ (2013) 31 (1) *Hofstra Labour and Employment Law Journal* 159, 165.

⁸⁸ Jamie Woodcock and Mark R. Johnson, ‘The Affective Labour and Performance of Live Streaming on Twitch.tv’ (2019) 20(8) *Television and New Media* 813, 815–816.

⁸⁹ Ewan Mackenzie and Alan McKinlay, ‘Hope Labour and the Psychic Life of Cultural Work’ (2021) 74(11) *Human Relations* 1841.

or exposure, with the hope of future employment opportunities.⁹⁰ This valorisation of immaterial labour is often influenced by the platforms, without due compensatory mechanisms being put in place, resulting in the rising precarity and reduction of the value of labour.⁹¹ Conceivably, with the commodification of user interactions on platforms, a “society-factor” arguably comes into being, where this labour is “[s]imultaneously voluntarily given and unwaged, enjoyed and exploited”.⁹²

At the threshold, by being self-employed, social media influencers would be entitled to the rights at work enumerated in the DFPRW.⁹³ As mentioned earlier, informality is characterised by the vulnerability and precarity generated by the absence of legal protection, rather than by the mere absence of an employment contract. In the context of social media influencers, this vulnerability is generated by the power inequities existing between the influencers and social media platforms. The entrepreneurial spirit that animates social media marketing is capable of obscuring this power imbalance.⁹⁴ The platforms have effectively emerged as quasi-monopolies, with the considerable lock-in period required for receiving sizeable returns resulting in the absence of feasible alternatives. By their very design and technological architecture, platforms retain the ability to unilaterally alter any technical parameters and contractual terms of engagement with little legal recourse for influencers.⁹⁵ Furthermore, the role of platforms as intermediaries effectively generates a separation between the influencers and their followers, allowing them to gain “ownership” of the

⁹⁰ Kathleen Keuhn and Thomas Corrigan, 'Hope Labour: The Role of Employment Prospects in Online Social Production' (2013) 1(1) *Political Economy of Communication* 9.

⁹¹ There have been suggestions by those on the left of the political spectrum that user-generated content might be compensated through a Universal Basic Income scheme. See, Andrew White, 'A Universal Basic Income in the Superstar (Digital) Economy' (2019) 13(1) *Ethics and Social Welfare* 64.

⁹² Tiziana Terranova, *Network Culture: Politics for the Information Age* (Pluto Press 2004) 74, where the author speaks of the “society-factory” more generally in the context of digital labour on the internet.

⁹³ This claim may not extend to mega-influencers, who have effectively transformed their social media influence into an expansive business enterprise.

⁹⁴ Valentin Niebler, “‘YouTubers Unite’: Collective Action by YouTube Content Creator” (2020) 26(2) *Transfer* 223, 225.

⁹⁵ Donato Cutolo and Martin Kenney, ‘Platform-Dependent Entrepreneurs: Power Asymmetries, Risks, and Strategies in the Platform Economy’ (2021) 35(4) *Academy of Management Perspectives* 584. Platforms also retain a more composite, or “panoptic”, view of the activities of all users, with the provision of information to influencers being tailored to suit the needs of the platform.

influencers' customer base.⁹⁶ Thus, platforms, rather than functioning as mere intermediaries for content distribution, have operated as “de facto provider[s] of labour”.⁹⁷ Although influencers arguably do not have a standard employment relationship with social media platforms, the vulnerability generated by these power asymmetries underscores the significance of the protection of fundamental rights at work, regardless of employment status, to “render the protective gap between employment and self-employment less dramatic”.⁹⁸

As mentioned earlier, the nascent attempts at regulating the influencer economy have primarily focused on the issue of disclosures, in the context of both consumer protection, generally, and investor protection, specifically. In 2021, the Advertising Standards Council of India (ASCI), which is a self-regulatory organisation,⁹⁹ issued a set of guidelines for influencer marketing in digital media.¹⁰⁰ The ambit of these guidelines was limited to necessary disclosures and due diligence, in consonance with the ASCI's own mandate. Subsequently, in 2023, the ASCI amended the guidelines to impose additional responsibilities on health and finance influencers to disclose their registration details and qualifications.¹⁰¹ While self-regulation, in order to bolster transparency and accountability in the exercise of influence, holds value, any attempts at self-regulation must sufficiently take the voices of labour into account, rather than veering into a lopsided pro-consumer direc-

⁹⁶ Donato Cutolo and Martin Kenney, ‘Entrepreneurship in the Platform Economy: Power Asymmetries and Risk’, in Bruno Dallago and Sara Casagrande (eds), *The Routledge Handbook of Comparative Economic Systems* (Routledge 2022) 360, 370. The authors provide the example of YouTube, where a YouTuber, if blocked by the platform, would instantly lose access to their entire fan base with no means of reconnecting in order to transfer their following to a new platform.

⁹⁷ Niebler (n 94) 223.

⁹⁸ Valerio De Stefano, ‘The Rise of the “Just-in-time” Workforce: On-demand Work, Crowdwork, and Labour Protection in the “Gig Economy”’ (2016) 37(3) *Comparative Labor Law and Policy Journal* 471, 501.

⁹⁹ ‘About Self-Regulation’ (*The Advertising Standards Council of India*) <<https://www.ascionline.in/about-self-regulation/>> accessed 23 June 2024.

¹⁰⁰ ‘ASCI Issues final Guidelines for Influencer Advertising on Digital Media, Launches ASCI Social platform’ (*The Advertising Standards Council of India*) <<https://www.ascionline.in/wp-content/uploads/2022/09/press-release-influencer-guidelines-2021.pdf>> accessed 23 June 2024.

¹⁰¹ ‘ASCI Places Additional Responsibility on Health and Financial Influencers, Extends Influencer Guidelines’ (*The Advertising Standards Council of India*) <<https://www.ascionline.in/wp-content/uploads/2023/08/Health-and-Finance-Guidelines-Update-Press-Release.pdf>> accessed 23 June 2024.

tion.¹⁰² Doing so risks the adoption of a lopsided view of the activities of social media influencers as being purely entrepreneurial, and negates the aspect of their labour as self-employed workers. Thus, regulatory attention in the realm of consumer protection and advertising standards, which primarily emphasises the “obligations” of social media influencers pertaining to disclosures and due diligence, obscure their status as self-employed workers and result in a lack of protections of their “rights” at work.

A year after the issuance of the ASCI guidelines, the Central Consumer Protection Authority (CCPA) issued the Guidelines for Prevention of Misleading Advertisements and Endorsements for Misleading Advertisements in 2022 (2022 Guidelines). These guidelines apply to “all advertisements, regardless of form, format or medium”,¹⁰³ and provide an expansive definition of the term “endorser”, which is wide enough to include influencers under its ambit.¹⁰⁴ The 2022 Guidelines, *inter alia*, require endorsers to carry out their own due diligence of the goods, products or services being endorsed,¹⁰⁵ and disclose any material connection with the trader, manufacturer or advertiser.¹⁰⁶ These guidelines were issued by the CCPA via the powers conferred upon it by section 18 of the Consumer Protection Act in 2019 (CPA). The CPA also empowers the Central Authority established under the Act to impose penalties of up to 1 million rupees on endorsers and manufacturers in case of false or misleading advertising, with every subsequent infraction inviting a penalty of up to 5 million rupees.¹⁰⁷ It is worth noting that this provision prescribes the same penalty for both endorsers and manufacturers, thereby failing to draw a distinction in the extent of their respective liabilities in respect of such false advertising. In the context of influencers, it treats self-employed workers on a par with business enterprises. It is highly questionable whether working-class nano and micro-influencers would have the financial means to pay the maximum leviable penalty, which is several times the GDP per capita,¹⁰⁸

¹⁰² De Stefano (n 98), 503, cautions against unilateral self-regulation by businesses and self-regulation with the singular goal of addressing consumer interests in the context of the gig economy.

¹⁰³ Guidelines for Prevention of Misleading Advertisements and Endorsements for Misleading Advertisements 2022 (2022 Guidelines), para 3(a).

¹⁰⁴ 2022 Guidelines, para (f) defines “endorser” as including “an individual or a group or an institution making endorsement of any goods, product or service in an advertisement whose opinion, belief, finding or experience being the message which such advertisement appears to reflect”.

¹⁰⁵ 2022 Guidelines, para 13(1)

¹⁰⁶ Ibid, para 14.

¹⁰⁷ Consumer Protection Act 2019 (CPA), s 21(2).

although the exact penalty imposed in each case would, of course, be subject to the Central Authority's discretion. Furthermore, the CPA also states that the Central Authority may prohibit the endorser of a false or misleading advertisement from endorsing any products or services for a period of up to one year, with every subsequent infraction inviting a prohibition of up to three years.¹⁰⁹ However, no such penalty in terms of an embargo on similar activity exists in respect of the manufacturer under the CPA. Consequently, in cases where such a prohibition is imposed, the activities of informal, self-employed workers, i.e., influencers, would be severely restricted, whereas capital accumulation by the manufacturer would continue unabated. The CPA states that no penalty will apply in cases where an endorser has undertaken requisite due diligence.¹¹⁰ Recently, the Securities and Exchange Board of India (SEBI) has also issued a consultation paper to elicit public comments on a proposal to restrict the association of SEBI-registered intermediaries and regulated entities with unregistered finfluencers,¹¹¹ although this has yet to translate into any concrete policy formulation. The shifting of risks onto influencers without affording them any rights at work seems emblematic of the Indian approach, resulting in exacerbating precarity.

4 REALISATION OF DECENT WORK THROUGH UNDILUTED FUNDAMENTAL RIGHTS AT WORK

The regulatory approach of the State towards influencer labour has been marked by an overemphasis on obligations, with little to no attention to their fundamental rights at work. The TikTok ban is emblematic of this approach. On 3 April 2019, the Madras High Court, in response to a writ petition, directed the government to prohibit the downloading of TikTok, citing concerns about children being exposed to pornography and other inappropriate content on the platform.¹¹² This ban was subsequently lifted by the High Court on 24

¹⁰⁹ CPA, s 21(4).

¹¹⁰ CPA, s 21(5).

¹¹¹ 'Consultation Paper on Association of SEBI Registered Intermediaries/ Regulated Entities with Unregistered Entities (including Finfluencers)' (*SEBI*, 25 August 2023) <https://www.sebi.gov.in/reports-and-statistics/reports/aug-2023/consultation-paper-on-association-of-sebi-registered-intermediaries-regulated-entities-with-unregistered-entities-including-finfluencers-_75932.html> accessed 23 June 2024.

¹¹² *S. Muthukumar v. Telecom Regulatory Authority of India*, Writ Petition (MD) No. 7855 of 2019 (Madras High Court, 3 April 2019).

April 2019.¹¹³ However, in June 2020, following a military clash along the Indo-China border, the Indian government banned TikTok alongside 58 other Chinese applications on the grounds that they were “prejudicial to sovereignty and integrity of India, defence of India, security of state and public order”.¹¹⁴ At the time of the ban, TikTok had 150 million active users,¹¹⁵ and the app had been hailed as an “equaliser” owing to a large chunk of the influencers on the app belonging to socioeconomically marginalised groups.¹¹⁶ The precarity of the TikTok influencers was exposed not only by the ban failing to account for TikTok being a source of income and opportunity generation for the influencers, but also by the labelling of content on TikTok as being “cringe” by elite influencers and consumers¹¹⁷ – a narrative that Khunteta and Rahman argue is rooted in the caste and class of TikTok influencers. Subsequent to the TikTok ban, influencers from marginalised groups have struggled to monetise their following through brand advertising, owing to the continued labelling of their content as “cringe” based on biases relating to caste and class, and biases inherent in collaborative algorithms that lead to the effective stratification of the social media space.¹¹⁸

The reproduction of hierarchies of caste and class, as well as rampant homophobia,¹¹⁹ bring out the significance of upholding non-discrimination

¹¹³ Abhijit Ahaskar and Prasad Banerjee, ‘Madras high courts lifts TikTok ban in India, in boost to ByteDance’ *Mint* (24 April 2019) <<https://www.livemint.com/technology/apps/madras-high-court-lifts-tiktok-ban-in-india-in-boost-to-bytedance-1556112108504.html>> accessed 23 June 2024.

¹¹⁴ Kumar and Thussu (n 11) 2.

¹¹⁵ Alexandra Levine, ‘India banned TikTok in 2020. TikTok still has access to years of Indians’ data’ (*Forbes*, 21 March 2023) <<https://www.forbes.com/sites/alexandralevine/2023/03/21/tiktok-india-ban-bytedance-data-access/>> accessed 23 June 2024.

¹¹⁶ Shivani Garg, ‘Unpacking the Impact of the TikTok Ban on Local Content Creators and the Rise of Indianized Social Media Apps’, in Soham De and others (eds), *Social Media and Society in India* (University of Michigan 2023) 66.

¹¹⁷ See generally Unnati Sharma, ‘TikTok vs YouTube is the New Class War on Internet. It All Began with a Roast’ (*The Print*, 18 May 2020) <<https://theprint.in/opinion/pov/tiktok-vs-youtube-is-the-new-class-war-on-internet-it-all-began-with-a-roast/423346/>> accessed 23 June 2024.

¹¹⁸ Nishtha Khunteta and Qudsia Rahman, ‘That’s Cringe: How Aesthetics and Algorithms Affect Monetization’, in Soham De and others (eds), *Social Media and Society in India* (University of Michigan 2023) 141.

¹¹⁹ See Shakuntala Banaji and Ramnath Bhat, *Social Media and Hate* (Routledge 2022) 75, 84, where the authors note that there is constant hostility and abuse via social media, often propagated by politicians and political parties, towards specific identities, namely LGBTQIA+, Dalits, and Muslims. See also, Lin Song

as a fundamental right at work for influencers, particularly those belonging to marginalised groups. At this juncture, it may be stated that India does not have a comprehensive anti-discrimination statute,¹²⁰ with the guarantee under Article 15 of the Constitution largely limited to State action and access to public spaces. For Dalit, Adivasi, female and queer influencers, non-discrimination in the digital space may also be tied to occupational safety, with growing instances of hate speech as well as death and rape threats. For instance, the recent suicide of a 16-year-old queer influencer from Ujjain, soon after reportedly receiving over 4,000 homophobic comments and threats on an Instagram reel, raised broader questions about non-discrimination, occupational safety, and the rights of kidfluencers in India.¹²¹ The existing legislative framework on occupational safety is largely sectoral and applies only to the formal workforce – a feature that is replicated by the OSHWCC, which is yet to come into force.¹²² In the context of the rights of kidfluencers, it is worth noting that the prohibition on child labour in the Indian Constitution is limited to hazardous employment for children below 14 years of age.¹²³ Additionally, the aforementioned 2016 amendment to the Child Labour (Prohibition) Act explicitly allows children to work in both family enterprises and the entertainment sector, thereby exempting kidfluencers with both an independent online presence and those who feature on their parents' accounts from the application of the Act. Lastly, given the power disparities and antagonistic relationship between platforms and influencers, the worker's right to organise is critical for challenging the platforms' "cloud empires".¹²⁴ However, given

and Avishek Ray, "'How Can a Small App Piss off an Entire Country?': India's TikTok Ban in the Light of Everyday Techno-Nationalism' (2023) 24(3) *Inter-Asia Cultural Studies* 382, 389.

¹²⁰ The Anti-Discrimination and Equality Bill 2016 was introduced by Dr Shashi Tharoor, an opposition MP, in the Rajya Sabha (Upper House) but did not result in an enactment by Parliament.

¹²¹ Navya Kharbanda, '16-year-old queer child Pranshu dies by suicide due to bullying; Did we fail as a society? Mental health expert opines' (*Hindustan Times*, 28 November 2023) <<https://www.hindustantimes.com/htcity/cinema/16yearold-queer-child-pranshu-dies-by-suicide-due-to-bullying-did-we-fail-as-a-society-mental-health-expert-opines-101701172202794.html>> accessed 23 June 2024.

¹²² See generally K.R. Shyam Sundar, 'Occupational Safety Continues to be Ignored as a Right' (2020) 55(39) *Economic & Political Weekly (Engage)* <https://www.epw.in/sites/default/files/engage_pdf/2020/09/24/157401.pdf> accessed 23 June 2024.

¹²³ Constitution of India 1950, art 23.

¹²⁴ Vili Lehdonvirta, *Cloud Empires: How Digital Platforms Are Overtaking the State and How We Can Regain Control* (MIT Press, 2022) 173.

the self-employed status of influencers, the statutory framework on collective organisation, both under the existing law and the new codes, is inapplicable to them. The constitutional right to form associations or unions enshrined in Article 19(1)(c) does not include the concomitant rights to collective bargaining and to strike, with the extent of the constitutional guarantee being exhausted upon the formation of a union.¹²⁵ Additionally, the implicit threat of deplatformisation and retaliation, the deliberate reduction of visibility, and the fragmentation of the influencers themselves operate as constraints on the right to organise meaningfully.

The veneer of entrepreneurship conceals the “nested precarities of visibility” for self-employed influencers, who experience precarity at the level of the market, industry, and platform features.¹²⁶ Although influencers seek to cast themselves in the mould of entrepreneurs, the power asymmetries between them and the social media platforms that they operate on result in the dismantling of traditional notions of entrepreneurship.¹²⁷ Indeed, the picture of the social media influencer emerges as that of a self-employed worker who is subjected to a heightened level of precarity and exists in a fraught relationship with both platforms and social hierarchies. In the Indian context, this precarity is exacerbated by the non-application of the extant labour law framework to social media influencers. However, this should not be cast as a failure to grapple with ostensibly novel forms of work. Rather, the lack of legal protections accorded to social media influencers is situated along a continuum of exclusions and dilutions, dating back to the colonial regime, that have denuded the fundamental rights at work of their universality and generated pervasive informality in the labour market.

5 CONCLUSION

The formalistic nature of Indian labour law is owed to both the colonial agenda of utilising labour law to transpose a largely rural and agrarian workforce into urban industries and factories, and the continued postcolonial salience of the “industry” in labour law.¹²⁸ This colonial continuity pervades the treatment of even ostensibly novel forms of work, as is the case with social media influencers. They operate in a context of precarity and informality that has come to define informal work in India. As the history of labour law in India suggests,

¹²⁵ Woodcock and Johnson (n 88), 814.

¹²⁶ Brooke Duffy and others, ‘The Nested Precarities of Creative Labor on Social Media’ (2021) 7(2) *Social Media + Society* 1.

¹²⁷ Cutolo and Kenney (n 95) 601.

¹²⁸ Deakin, Marshall and Pinto (n 17) 11.

the informal worker does not exist beyond the boundaries of State regulation; rather, the informality itself is a consequence of State policies that privilege the interests of capital over those of labour.¹²⁹ The influencer economy has, in fact, begun to elicit regulatory interest. The fact that this interest has limited itself to an articulation of influencers' obligations demonstrates how the State's policy choices can directly or indirectly lead to the reproduction of informality. However, to simply attribute the lack of legal protections accorded to influencers to the lack of regulatory attention to their rights is to capture only part of the problem. The broader issue is the aforementioned "protective gap" between standard employment relationships and non-standard forms of work. This gap has made short shrift of the fundamental rights at work for most workers, excluding the small minority in the formal economy, despite their universal character. The aforesaid reproduction of informality, in the context of social media influencers, is situated within this broader phenomenon of pervasive formality, shaped by the colonial continuities characterising Indian labour law.

¹²⁹ Mezzadri (n 78) 491.

10. Navigating the labour law challenges and implications for digital influencers in Brazil: A call for enhanced regulatory practices

Andreia de Oliveira

1 INTRODUCTION

This chapter presents an examination concerning the roles, influences, as well as legal and regulatory environment relating to the burgeoning digital influencer industry within the Brazilian context. The legal issues discussed in this chapter are a general overview of the most relevant tax and advertising aspects, with a focus on the labour law implications of the influencer industry in Brazil.

Considering the escalating prominence of digital influencers within the contemporary online milieu, and their subsequent impact on sectors ranging from advertising to politics, this work highlights the imperative for further scrutiny of the existent regulatory framework. It argues for a critical reassessment of prevailing regulations, especially given emerging issues such as labour rights specific to online content creators. Such an evaluation reveals potential gaps that require innovative legislation specifically aimed at ensuring the effective safeguarding of these unique employment circumstances.

Stemming from the recognition that this nascent industry presents unique challenges not currently catered for within established labour law or regulation systems based on traditional employment categories, there is a significant case for revisions and adaptations to Brazilian legislation. These reforms may involve new categories or classifications recognising peculiar characteristics relevant only to influencer work arrangements while effectively addressing issues specific to this rapidly evolving sector.

All these considerations promise not only domestic relevance but also significant contribution globally by sparking academic discourse about how traditional labour and employment laws wrestle with novel realities introduced by rapid growth in non-traditional forms, such as those prevalent in social media-driven economies like Brazil's flourishing digital gig economy.

The chapter opens with an introduction to Brazil's digital influencer market, zooming in on consumer behaviour and some of the most glaring regulatory challenges. Such challenges are then examined in the following section, which portrays the most relevant regulatory aspects of the industry, including consumer protection, tax law, advertising standards, and concerning national agencies that currently affect the industry, as well as past and ongoing attempts at influencer-specific regulation. The next section focuses solely on labour law, its principles and how they can be applied to influencers operating in Brazil. The main question of this chapter – are influencers employees? – is then addressed, followed by a recommendation section and concluding remarks.

2 INSIGHTS INTO BRAZIL'S DIGITAL INFLUENCER MARKET: CONSUMER BEHAVIOUR AND REGULATORY CHALLENGES

Brazilians spend a total of 9 hours and 32 minutes online per day.¹ According to a report from July 2023, on average 3 hours and 49 minutes are spent on social media.² This is more than any other country and nearly 1.5 hours more than the global average.³ The most used application is WhatsApp, used by approximately 118.5 million Brazilians, which represents 98% of the country's population. As of February 2023, 53% of internet users in Brazil aged 55 and over said they used WhatsApp as a news source.⁴ Among respondents from the 25–34 age group, the share is lower, but is still significant at 33%.⁵

With so much time spent online and on social media specifically, the online space affects the offline. Politics, health, shopping, and travel are strongly influenced by social media globally. The impact of social media on these aspects of life is particularly pronounced in Brazil, where the population has

¹ 'These countries spend the most time online' (*atlasVPN*, 2023). <<https://atlasvpn.com/blog/these-countries-spend-the-most-time-online>> accessed 23 June 2024.

² Simon Kemp, 'Digital 2023 July Global Stashot Report' (*Datareportal*, 2023). <<https://datareportal.com/reports/digital-2023-july-global-statshot>> accessed 23 June 2024.

³ Ibid.

⁴ That means users share links and snippets of news with their contacts. It is a habit that feeds into the mistrust of mainstream media and amplifies alternative networks.

⁵ Reuters Institute for the Study of Journalism, 'Digital News Report 2023' (*YouGov*, 2023). <<https://reutersinstitute.politics.ox.ac.uk/digital-news-report/2023/interactive>> accessed 23 June 2024.

embraced digital platforms wholeheartedly. Marketing experts have long caught on to this, and Brazilian influencers are not short of offers.⁶ Besides the usual aspirational and lifestyle content, the last few years saw an uptake in influencer campaigns touching on serious issues, such as the 2022 elections⁷ and the COVID-19 pandemic.⁸

It is not hard to imagine the challenges that have arisen from both situations. In a concerning turn of events, influencers were paid to endorse unverified COVID-19 treatments that were being championed by then-president Jair Bolsonaro, despite lacking scientific credibility.⁹ This phenomenon not only underscores the susceptibility of digital spaces to misinformation, but also highlights the potential consequences when influential figures prioritise personal gain over public health. Anti-mask sentiments and anti-vaccine rhetoric, propagated by certain influencers, have further fuelled polarisation, and hindered collective efforts to combat the pandemic.¹⁰

The 2022 elections witnessed a similar pattern, with influencers aligning themselves with divisive political agendas.¹¹ The deliberate dissemination of polarising content and misinformation through these channels has contributed to an increasingly fragmented and polarised public discourse.¹² In a country already grappling with political tensions, the role of influencers in amplifying divisive narratives has added an additional layer of complexity to the socio-political landscape.¹³ This confluence of misinformation, influencer

⁶ In 2022, it was estimated that 7 out of every 10 brands have invested in influencer marketing and, according to research, 67% of brands reported expecting to increase their investment in this sector in 2023.

⁷ Fernando Lattman-Weltman, 'Mídia e eleições 2022: comunicação e política em contexto de alta e previsível imprevisibilidade' in Magna Inácio; Vanessa Elias de Oliveira (ed), *Democracia e Eleições no Brasil: Para onde Vamos?* (Hucitec 2022).

⁸ Aline Dalmolin, 'Estratégias Discursivas de Influenciadores Digitais na Campanha de Atendimento Precoce da Covid-19' (2023) 3 Brazilian Creative Industries Journal 120.

⁹ Ibid, 123.

¹⁰ Ibid, 129–130.

¹¹ Marco Aurélio Ruediger and others, 'Eleições 2022, desinformação e ataques ao sistema eleitoral: repercussão do debate público digital das eleições presidenciais brasileiras de 2022' (2023).

¹² Ibid.

¹³ Social media has an immense power to disseminate fake news, with the power to influence people, shape public opinion and directly interfere with electoral results. It creates a prime environment for democratic regress. Amanda Breton, 'Tribunal Superior Eleitoral no combate das fake-news: ações e prevenções nas eleições presidenciais de 2018 e 2022' (2023).

marketing, and political polarisation underscores the need for a nuanced understanding of the digital landscape in Brazil. As the lines between entertainment, information, and advocacy blur, the impact of influencers on public opinion and societal attitudes becomes a complex and multifaceted phenomenon, with consequences that extend beyond the confines of the virtual world.

Digital influencers, for better or worse, have become the opinion leaders of today. The dynamic between influencers and their followers fosters a unique type of trust, originating from their perceived relatability and proximity. Brands have taken notice of this influential relationship and recognised influencers as powerful intermediaries for connecting with their target audience.¹⁴ This realisation has prompted a shift in advertising strategies, with many brands leveraging influencers to promote their products or services.¹⁵ This has proven extremely effective in Brazil, where influencers yield the biggest power over people's purchasing decisions out of any other observed country.¹⁶ In 2023, 44% of Brazilians reported buying a product advertised by an influencer.¹⁷ In a different survey that was limited to Brazilians who use at least two social media platforms and follow digital influencers, 76% of respondents claimed to have made a purchase based on an influencer's recommendation.¹⁸

Such impact on consumer behaviour raises several challenges in the realm of consumer protection law. One primary challenge is the blurred line between authentic content creation and promotional activities. Influencers often seamlessly integrate advertisements into their content, making it challenging for consumers to discern between genuine recommendations and paid endorse-

¹⁴ Sergio Ibáñez-Sánchez and others, 'Influencers and brands successful collaborations: A mutual reinforcement to promote products and services on social media' (2022) 28 *Journal of Marketing Communications* 469.

¹⁵ Nielsen's Consumer Trust Index reports that 92% of consumers trust influencer marketing over traditional advertising. Not only that, but influencer marketing content delivers 11 times better return on investment than other more traditional marketing tactics. See: Michael Fertik, 'Why is influencer marketing such a big deal right now?' <<https://www.forbes.com/sites/michaelfertik/2020/07/02/why-is-influencer-marketing-such-a-big-deal-right-now/?sh=f1e69ef75f30>> accessed 23 June 2024.

¹⁶ Katharina Buchholz, 'Influencers: The influence of influencers' (*Statista*, 2024) <<https://www.statista.com/chart/24933/share-of-respondents-saying-they-purchased-something-because-of-influencers/>> 23 June 2024.

¹⁷ *Ibid.*

¹⁸ Instituto Qualibest, 'O Post é Pago, e aí? Desvendando e quantificando a relação entre os internautas e as ações de marcas com influenciadores digitais' (*Qualibest*, 2019) <https://www.institutoqualibest.com/wp-content/uploads/2019/11/O-post-e-pago.-e-ai.pdf?utm_source=organico> accessed 23 June 2024.

ments.¹⁹ This lack of transparency raises concerns about deceptive practices and the potential exploitation of consumer trust.²⁰ The need for clear guidelines on disclosure, transparency, and ethical promotional practices becomes increasingly crucial as influencers wield substantial influence over consumer choices, necessitating an ongoing dialogue between industry stakeholders, influencers, and regulatory bodies to ensure robust consumer protection in the dynamic landscape of digital marketing.²¹

Another challenge in the market is defining the employment status of these individuals. Under Brazilian labour law, an employee is defined as an individual who renders services on a regular basis, under subordination (i.e. subject to direct oversight) and dependency on their employer, in exchange for remuneration.²² However, digital influencers often operate as independent contractors, having the freedom to create their own content and choose their own partnerships.²³ This poses a challenge for regulators in determining whether digital influencers should be classified as employees or independent contractors, as their relationship with brands may fall somewhere in between. Their relationships with the platforms themselves also need to be taken into consideration for the establishment of an employment relationship.²⁴

This classification is crucial as it determines the rights and protections afforded to these individuals, such as minimum wage, working hours, social security contributions, and others. Additionally, this classification also impacts the responsibilities and liabilities of both influencers and brands, such as tax obligations, liability for false or misleading advertising, and compliance. The following sections of this chapter first describe the general regulatory landscape and then the challenges and implications within, specifically, the Brazilian labour law associated with the influencer market.

¹⁹ Matthew Mitchell, 'Free ad (vice): Internet influencers and disclosure regulation' (2021) 52 *The RAND Journal of Economics* 3, 3.

²⁰ Laura E Bladow, 'Worth the click: Why greater FTC enforcement is needed to curtail deceptive practices in influencer marketing' (2017) 59 *Wm & Mary L Rev* 1123, 1125.

²¹ *Ibid*, 1125–1127.

²² Montgomery & Associados, 'Basic Brazilian Labour and Employment: Rights and Entitlements' (*Montgomery & Associados*, 2020) <<https://montgomery.adv.br/wp-content/uploads/2020/11/DOING-BUSINESS-IN-BRAZIL-Basic-Labour-and-Employment-Rights-and-Entitlements-Montgomery-Associados-September-2020.pdf>> accessed 23 June 2024.

²³ Lílían Rezende de Souza, 'Trabalho e plataformas digitais: os influenciadores digitais sob uma perspectiva trabalhista', p. 16–17 <<https://repositorio.uniceub.br/jspui/handle/prefix/16535>> accessed 23 June 2024.

²⁴ *Ibid*, 18–19.

3 OVERVIEW OF KEY REGULATORY ASPECTS

Digital influencers have become a prominent force in the online world – according to a 2022 estimate, Brazil has around 500,000 influencers.²⁵ Yet, there is currently no regulatory framework that specifically addresses digital influencers. However, this does not mean that digital influencers in Brazil operate without any regulations or legal considerations.²⁶ While Brazil may not have specific regulations targeting digital influencers, there are existing laws and regulations that can apply to their activities. For example, consumer protection laws in Brazil, such as the Consumer Protection Code (CPC), apply to digital influencers.²⁷ These laws require influencers to disclose any sponsored content and make it clear to their audience that they are being paid or receiving benefits for promoting a product or service.²⁸ The Brazilian Association of Digital Agencies (ABRADI) has developed the Code of Conduct for the Hiring of Influencers, which provides guidelines for both influencers and brands regarding ethical practices in influencer marketing.²⁹ In the Code, ABRADI recommends the use of legal contracts between influencers and brands so that relationships remain professional and legitimate.³⁰ This helps ensure transparency and accountability in influencer collaborations.³¹

Another relevant agency is the National Council for Advertising Self-Regulation in Brazil (CONAR). CONAR is responsible for guaranteeing freedom of commercial expression while safeguarding consumer rights. It is

²⁵ Brazil has approximately 500,000 influencers with at least 10,000 followers. Luiz Felipe Castro, ‘Pesquisa revela que Brasil é o país dos influenciadores digitais’ <<https://veja.abril.com.br/comportamento/pesquisa-revela-que-o-brasil-e-o-pais-dos-influenciadores-digitais>> accessed 23 June 2024.

²⁶ Pâmela Boschetti, ‘Influenciadores digitais e a ausência de regulamentação: um estudo sobre a complexidade envolvida na relação com empresas privadas’ (2022), 34.

²⁷ Natália Soler Dotta Duarte, ‘A incidência do Código de Defesa do Consumidor na atividade de influenciadores digitais’ (2022).

²⁸ Luciana Cristina de Souza and Fabíola Fonseca Fragas de Almeida, ‘Responsabilidade dos influenciadores digitais por publicidade oculta segundo o código de defesa do consumidor’ (2021) 3 *Revista de Estudos Interdisciplinares*, 60.

²⁹ ABRADI, ‘Código de Conduta Para Agências Digitais Na Contratação de Influenciadores’ (*Abradi*, 2017) <<https://abradi.com.br/wp-content/uploads/2017/07/Abradi-Influenciadores.pdf>> accessed 23 June 2024.

³⁰ *Ibid.*

³¹ Ana Carolina Melo and others, ‘A era dos influenciadores digitais: o novo modelo de trabalho’ (2021) 1 *Revista Projetos Extensionistas* 215, 216.

also responsible for receiving complaints from consumers.³² In 2021, CONAR published their Digital Influencer Guidelines,³³ which are an important initiative and establish helpful standards for advertising. However, it is important to emphasise that CONAR has no power to punish, fine, alter or remove misleading advertising from circulation. Still, it is a widely respected agency, and companies tend to follow its decisions.³⁴

Alongside CONAR, the CPC protects public interests such as transparency and harmony in consumer relationships and can be applied to influencer activities.³⁵ The CPC establishes three types of illicit conduct that can apply to influencers: misleading advertising (misleads the consumer regarding the quantity or quality of the product or service), hidden advertising (disguises the promotional content) and abusive advertising (violates social values, such as respect to the environment, human dignity and safety).³⁶ When it comes to digital influencing, hidden advertisement is the most common concern, as influencers may not always clearly disclose their partnerships or sponsorships with brands. Unfortunately, even when combining CONAR's regulations with the CPC, sanctions for this specific violation remain limited.³⁷

Another area of law that affects influencers is Brazilian tax law. In the context of influencer marketing, influencers are understood to be service providers for tax purposes.³⁸ This is, however, an expansive interpretation of the definition of service provider under relevant legislation, which was broadened by Brazil's Supreme Court (STF).³⁹ The service provided is their own influ-

³² Maria Luísa Lopes Kanzler, 'Análise interpretativa do comportamento do influenciador digital com enfoque na responsabilidade civil e no direito do consumidor' (2020), 16.

³³ CONAR, 'Digital Influencer Advertising Guidelines' (Conar, 2021) <http://conar.org.br/pdf/CONAR_Digital-Influencer-Advertising-Guidelines_2021-03-11.pdf> accessed 23 June 2024.

³⁴ Maria Luisa Lopez Kanzler, 'Análise interpretativa do comportamento do influenciador digital com enfoque na responsabilidade civil e no direito do consumidor', p. 16 <<https://repositorio.uniceub.br/jspui/handle/prefix/14934>> accessed 23 June 2024.

³⁵ Nathalia Cristine Garcia Gomes, 'A responsabilidade civil e penal dos influenciadores digitais: as relações de consumo e a publicidade à luz do Código de Defesa do Consumidor' (2023), 30.

³⁶ Ibid, 25–26.

³⁷ Kanzler (n 34) 19–20.

³⁸ Lorena de Souza Rodrigues, 'Direito tributário e redes sociais: estudo sobre a possibilidade de incidência do Imposto sobre Serviços nas atividades realizadas pelos influenciadores digitais no Instagram' (2021), 75.

³⁹ Ibid, 75.

ence over followers, their image, credibility, and creative input on the content they create. Influencers are then compensated monetarily or through other forms, such as free products or services, which, either way, establish the necessary relationship with brands for tax implications.⁴⁰ In this scenario, regardless of whether influencers are reporting as individuals or as business entities, their activities are subject to the Tax on Services (ISS).⁴¹ This tax is levied by municipalities and the rate varies depending on the location. Additionally, influencers are also subject to income tax in Brazil.⁴² However, it is important to note that the enforcement of tax regulations on influencers in Brazil has been limited. In Brazil, the regulatory landscape for digital influencers is still evolving and there are several areas of concern that need to be addressed.⁴³

In an attempt to narrow this regulatory gap, in 2018 Bill No. 10937/2018 was proposed. It aims to regulate the profession of digital influencers, forbid the dissemination of damaging content such as hate speech, and require influencers to respect the right to privacy, intellectual property, and rights of vulnerable groups (children, women, elderly, afro-Brazilians and minorities).⁴⁴ The bill was never submitted to vote in the legislative house, as the author requested to remove it for a correction of material error; no further developments were made, which led to it being archived in 2019.⁴⁵ Currently, Bill No. 2347/2022 is under consideration. Besides similar provisions to the previous bill, this one proposes a federal registry for the exercise of the profession of digital influencer. It also requires “technical knowledge” (e.g. graduate degree) for influencers to be allowed to discuss certain topics.⁴⁶ It is still under discussion, but it is unlikely to be approved. The bill is considered controversial due to the limitations imposed on who can be designated as a digital media influencer and its differentiation from those who will be considered unfit to influence a given subject. In addition, there is a concern that this provision would be unconstitutional. The Federal Constitution ensures that the exercise of any profession

⁴⁰ Ibid, 75–76.

⁴¹ Ibid, 72–73.

⁴² Ibid, 55.

⁴³ Ibid, 76.

⁴⁴ Chamber of Deputies of Brazil, ‘Bill 10937/2018: Dispõe sobre a regulamentação do ofício de Influenciador Digital Profissional’ <<https://www.camara.leg.br/proposicoesWeb/fichadetramitacao?idProposicao=2185136>> accessed 23 June 2024.

⁴⁵ Ibid.

⁴⁶ Chamber of Deputies of Brazil, ‘Bill 2347/2022: Dispõe sobre a regulamentação da atividade profissional de influenciador digital profissional no âmbito Federal’ <https://www.camara.leg.br/proposicoesWeb/prop_mostrarintegra?codteor=2204364&filename=PL%202347/2022> accessed 23 June 2024.

is free, bar any legally required qualifications, and everyone can exercise any economic activity regardless of authorisation.⁴⁷

4 BRAZILIAN LABOUR LAW PRINCIPLES AND INFLUENCERS

The historical landscape of Brazilian labour law is rooted in the early 20th century, a period marked by a rapidly industrialising economy and a surge in worker organisation. Key to this evolution was the enactment of the Consolidation of Labour Laws (CLT) in 1943, a unified code aimed at regulating employment relationships and ensuring worker protection in an era of growing industrialisation. It was designed to establish a clear delineation between the rights and obligations of workers and employers, largely within the conventional paradigms of employment. The Constitution of 1988 further underscored these protections, emphasising the social value of labour and the wellbeing of workers as fundamental to the nation's socioeconomic framework.

In recent years, the traction gained by the gig economy and digital platforms for work has presented complex challenges to Brazil's traditional employment frameworks. As more individuals turn to informal work – including a significant portion of Brazil's workforce – digital workers represent a paradigm shift from the historical norms established under the CLT. Influencers and digital content creators, emblematic of the modern, flexible, and often autonomous worker, exemplify the discrepancy between traditional legislation and the fluid nature of informal digital work. This disconnect exposes a gap in legal protections for such workers, who typically do not benefit from the same guarantees as formal employees. As Brazil contends with one of the world's largest informal job markets, it faces the critical task of reconciling its labour laws with the realities of digital work to ensure fairness and equity in a changing economic landscape.

Today, the basic rules governing labour and employment relationships in Brazil are set out in the Federal Constitution and by the Brazilian Consolidation of Labour Laws. Pursuant to Article 3 of the CLT, an employee is defined as an individual who renders services on a regular basis, under subordination (i.e. subject to direct oversight) and dependency on their employer, against receipt of salary.⁴⁸ It follows from the foregoing that if any individual

⁴⁷ Daniela Brandt, 'Relações contratuais entre empresas e influenciadores digitais: consequências da profissionalização da influência digital nos contratos empresariais' (2022), 64.

⁴⁸ Montgomery & Associados (n 22).

renders services in Brazil under a relationship in which the above-mentioned requirements are satisfied, they will be considered an employee and, therefore, be entitled to labour rights and entitlements that cannot be waived, even if the prior arrangement between the parties provided otherwise.⁴⁹ Conversely, an employer is a company, entity or individual who assumes all the economic risks of its activities, hires, pays a salary, directs, coordinates, and oversees services rendered by the employee(s).⁵⁰

Furthermore, regardless of the place of hiring, the origin of the agreement or the company, if the services are rendered in Brazil, Brazilian law will apply.⁵¹ If the services are rendered in multiple countries including Brazil throughout a single employment relationship, Brazilian case law determines that the most favourable legislation shall apply to the employee's rights and entitlements.⁵² This is especially relevant in the digital influencer industry, where individuals often work remotely and have followers and clients from around the world. In the digital influencer industry in Brazil, one of the key labour law challenges is determining the employment status of influencers and content creators.

Despite the growing recognition of influencing as a profession, there are still debates and uncertainties regarding the employment status of influencers and content creators in Brazil. As it does not fit squarely into the traditional employment relationships defined by the CLT, there is ambiguity as to whether influencers are considered employees or independent contractors.⁵³ Generally, activities performed by influencers and content creators in Brazil are regulated by the general rules of the Civil Code, the Consumer Protection Code and other applicable regulations, such as CONAR's self-regulatory guidelines for advertising in digital media.⁵⁴ However, these regulations do not provide clear guidelines on the employment status of influencers and content creators.⁵⁵

Brazilian labour law operates under the guiding principle of protection, meaning it aims to protect the vulnerable part of an employment relation-

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid.

⁵³ Pamela Boschetti, 'Influenciadores digitais e a ausência de regulamentação: um estudo sobre a complexidade envolvida na relação com empresas privadas', p. 40 <<http://repositorio.fdv.br:8080/handle/fdv/1394?locale=es>> accessed 23 June 2024.

⁵⁴ Ibid, 34.

⁵⁵ Carolina Gomes, 'Aspectos jurídicos do influenciador digital' (*PHMP Advogados*, 2022) <<https://phmp.com.br/aspectos-juridicos-do-influenciador-digital/>> accessed 23 June 2024.

ship.⁵⁶ It provides the employee with protection against labour exploitation, guarantees minimum working conditions, and ensures social security benefits. Therefore, it is crucial to determine the employment status of influencers and content creators to define what exactly their rights and entitlements are under labour law in Brazil.⁵⁷

As for the independent contractor status, it requires factors such as a certain degree of control exerted by influencers and whether they have the freedom to choose their work schedule, clients, and projects.⁵⁸ Also, operating as a corporate entity is often seen as an indication of an independent contractor status.⁵⁹ The contract between parts can be used to formalise requirements such as independence and autonomy of parts, with the goal of removing the relationship from the realm of labour law.⁶⁰ However, it is important to note that each case may be unique and should be evaluated individually to determine the employment status of influencers and content creators. When the minimum elements for establishing an employment relationship are met, influencers and content creators could still be considered employees under Brazilian labour law, which will prevail over any contractual agreements or attempts to classify them as independent contractors.⁶¹ This is the subject of many cases argued before Brazilian Labour Courts, as many companies inappropriately utilise this model to mask a genuine employment relationship.⁶²

Brazil's journey through the complexities of modernising its labour laws within the informal and digital sectors echoes a global challenge. Digital work transcends national boundaries and thus requires a nuanced approach to labour representation and rights enforcement. As one of the world's largest economies, Brazil's efforts to adapt its employment laws for digital workers not only have profound domestic impacts but also contribute to a larger international discourse on the future of labour. The Brazilian experience offers valuable insights into balancing traditional legal protections with the flexibility demanded by the digital age, serving as a potentially influential model for nations worldwide as they seek to navigate the evolving nexus of work, technology, and legal frameworks in the global economy.

In the global landscape, the status of digital influencers in the labour market varies significantly. In the United States, many influencers navigate their

⁵⁶ Boschetti (n 53) 39.

⁵⁷ Ibid, 39–40.

⁵⁸ Ibid, 43.

⁵⁹ Gomes (n 55).

⁶⁰ Ibid.

⁶¹ Souza (n 23) 17.

⁶² Montgomery & Associados (n 22) 7.

professional lives as independent contractors, a classification that affords them a degree of autonomy but often leaves them without traditional employment benefits, such as healthcare or retirement plans. Across the Atlantic, the European Union is progressively recognising the rights of gig workers, a category that could encompass influencers, thereby extending to them certain employee-like protections and benefits. The juxtaposition of these models presents a dichotomy: the American approach promotes entrepreneurial freedom at the potential cost of worker security, while the European model leans towards inclusivity at the risk of reducing flexibility. The applicability of these frameworks to Brazil poses a complex question: should Brazil adopt a similarly flexible yet precarious model, or could it pave its own path towards a more protective regulatory environment, considering the unique composition and challenges of its labour market? This comparative perspective could guide Brazil in forging labour laws that harmonise the innovative nature of digital influence with the foundational principles of worker protection.

The rise of the platform economy and the digitalisation of work pose unique challenges for Brazil's existing labour legislation. Professions anchored in digital platforms, such as those of digital influencers, operate under conditions that traditional labour laws do not readily accommodate. Issues pivotal to this sector, including algorithm governance and content regulation, are usually beyond the scope of established labour protections. While Brazilian law grapples with acknowledging the atypical work patterns of influencers, there is an emerging need to evolve labour protections to account for these new professional dynamics. Such an evolution would involve a deeper understanding of digital workflows, perhaps even the creation of legal categories that recognise the peculiarities of virtual workspaces, to ensure influencers' rights are robustly defended.

Given the unique challenges inherent in the influencer profession, Brazil stands to benefit from legislation tailored to the specifics of this modern economic role. Influencers often deal with ambiguous work hours, intellectual property intricacies, and fluctuating recognition – issues that are not fully addressed by conventional labour laws. Specialised legislation could afford influencers the clarity and legitimacy necessary for stable careers while also safeguarding their occupational flexibility. This could involve provisions for defining working conditions, ensuring fair remuneration, and protecting creative content rights. Brands, audiences, and influencers alike would benefit from such regulation, fostering a more transparent, accountable, and equitable digital marketplace. In effect, purpose-built influencer legislation in Brazil could serve as a pioneering model for the global digital economy, balancing individual agency with collective responsibility.

5 ARE INFLUENCERS EMPLOYEES?

In Brazil, the determination of employment status hinges on the fulfilment of certain criteria, as established by labour law and elucidated in court rulings. The central principles to be considered include the degree of control exercised by the hiring party, the dependency of the worker, and the autonomy permitted within the working arrangement. Specifically for influencers, evaluating their employment status entails examining the nature of their contractual agreements, the level of supervision and direction they are subject to, and the extent to which they can independently manage their workload and creative content. Internationally, such as with the IRS in the United States or the UK's Employment Status Indicator, similar factors are considered with a high degree of specificity. The insights from these international criteria could potentially inform Brazil's judicial interpretation, particularly in cases where digital influencers' work patterns deviate from the traditional employee paradigms.

In Brazil, the classification of influencers as employees under labour law is a topic of contention and is conditional to specific circumstances. Influencers may be deemed as employees if they satisfy the essential criteria for establishing an employment relationship. In situations involving digital influencers, their activities entail personal performance by individuals and are generally continuous, with compensation being provided. However, the issue of subordination presents a challenge as it varies from case to case. As all characteristics must be met simultaneously, this leads to difficulties in definitively categorising the status of digital influencers within labour laws in Brazil.

Subordination is an intrinsic prerequisite for the characterisation of an employment relationship. The absence of this or any other prerequisite means that the service provider obtains another denomination and is part of another type of work. The opposite of subordination is autonomy, which is a multifaceted idea and is usually explicitly associated with the freedom of self-government and self-management that qualifies a form of work as self-employment.⁶³ For autonomy, two characteristics are striking: ownership and organisation.⁶⁴ Autonomous workers carry out their activities with their own organisation, initiative and discretion, as well as the choice of place, mode, time and form of execution, which would qualify this self-employed person as a real entrepreneur.⁶⁵ The activity carried out by digital influencers

⁶³ Ana Claudia Moreira Cardoso, Karen Artur and Murilo Carvalho Sampaio Oliveira, 'O trabalho nas plataformas digitais: Narrativas contrapostas de autonomia, subordinação, liberdade e dependência' (2020) 5 *Revista Valore* 206, 218.

⁶⁴ *Ibid.*, 218.

⁶⁵ *Ibid.*

is very similar to self-employed workers. They usually have the freedom to create their content the way they want, in the time they want, and they assume the risks of their own venture.⁶⁶

The current practice in Brazil is to establish a relationship between digital influencers and private companies through legal agreements. This follows the best practice recommendations laid by the CONAR Guide and ABRADI. Civil law, as well as tax law and consumer law, conceptualises this contractual relationship as a service contract,⁶⁷ which creates obligations for the individual person, the influencer. In ordinary cases, such as brand deals, the autonomy of the influencer is evident. They have the power to accept or decline a brand's offer, to set their own rates, and how and when to deliver the content. However, if they essentially act as spokespeople for a company, tying their personal image to the brand, working under non-compete clauses and relying on said brand for a considerable portion of their income, the question of dependency and thus subordination may again be raised.

That is not the only concerning scenario, as social media influencers are also in complex relationships with the platforms that host their content. Questions surrounding platform workers have been raised in recent years mainly due to concerns related to the vulnerability of gig workers, such as Uber drivers and delivery workers.⁶⁸ While influencers are not perceived to be as vulnerable in their relationship to platforms, one major concern that is applicable to both are platform-based vulnerabilities.⁶⁹ Influencers, much like other types of platform workers, are subjected to subordination based on the algorithmic management performed by the platform.⁷⁰ Influencers are individuals who have gained a significant following on social media and leverage this influence to access financial opportunities.⁷¹ Therefore, it is important for influencers to understand the algorithms that govern visibility on social media as a means of both accessing their existing follower base, but also to grow it.⁷² Social media

⁶⁶ Boschetti (n 53) 43.

⁶⁷ See: Section 4.

⁶⁸ Uttam Bajwa and others, 'Towards an understanding of workers' experiences in the global gig economy' (2018) 14 *Globalization and Health* 2, 17ff.

⁶⁹ *Ibid*, 18.

⁷⁰ Henrique Amorim and Felipe Moda, 'Work by app: Algorithmic management and working conditions of Uber drivers in Brazil' (2020) 14 *Work Organisation, Labour & Globalisation* 101, 107.

⁷¹ Crystal Abidin, 'Communicative intimacies: Influencers and perceived interconnectedness' (2015) *Ada: A Journal of Gender, New Media & Technology* 8.

⁷² Kelley Cotter, 'Playing the visibility game: How digital influencers and algorithms negotiate influence on Instagram' (2018) 21 *New Media & Society* 895, 896.

platforms offers them feedback through metrics of engagement (such as likes and comments), which in turn contribute to the degree of visibility they can achieve. Engagement evidences and validates influencers' social status and social capital in the "attention economy".⁷³

In simplified terms, platforms use sophisticated algorithms to determine the content they display, offering visibility to what they, somehow, determine to be of users' interest.⁷⁴ This presents, to influencers, the *threat of invisibility*, which disciplines them into behaving according to the platform's desires.⁷⁵ The asymmetry of knowledge between platforms and influencers over their algorithmic visibility management reinforces the vulnerability of influencers.⁷⁶ This establishes a form of subordination. In Brazil, the possibility of algorithmic subordination is provided for in the sole paragraph of Article 6 of the CLT: "The telematic and computerized means of command, control and supervision are equivalent, for the purposes of legal subordination, to the personal and direct means of command, control and supervision of the work of others." Thus, even without conventional personal subordination, the algorithms carry out telematic control of influencers within platforms, establishing a form of subordination.

As digital platforms become common workplaces, the concept of algorithmic control introduces new dimensions to the concept of subordination in labour law. Influencers may find their content reach, engagement, and monetisation substantially influenced by platform algorithms, raising the question of whether such algorithmic oversight parallels an employer's direct control over an employee's conditions of work. Brazilian law has yet to fully address whether the guidelines and restrictions imposed by algorithms constitute a form of control analogous to that in traditional employer–employee relationships. The extent to which these technological mechanisms impact the creative and operational freedom of influencers could be pivotal in assessing their status under labour laws, questioning long-standing definitions of subordination and independence.

Within this context, scholars have proposed creating a new category called "*parassubordinação*" (para-subordination).⁷⁷ The term describes a situation of relative autonomy of the worker in relation to the hiring party, characterised

⁷³ Ibid, 897.

⁷⁴ For a more detailed explanation, see *ibid*.

⁷⁵ Ibid, 898.

⁷⁶ Ibid.

⁷⁷ Souza (n 23) 17.

by some economic dependency⁷⁸ – that is, a worker that formally operates as independent, but is economically reliant on the other party.⁷⁹ This new classification can also be called “quasi-subordination”.⁸⁰ In sum, the goal of this new form of employment is to broaden the scope of labour rights in order to extend varying levels of protection to non-standard forms of work.

Defining legal and ethical parameters for digital influencers is complex due to the lack of specific comprehensive regulations or laws governing this area. This underscores the necessity for legislative innovation that is able to accommodate these novel professional roles stemming from social media platforms. Whether influencers are classified as employees, independent contractors, or other categories, their activities remain subject to consumer rights guidelines, while civil law norms oversee contractual agreements, accompanied by labour rights aimed at protecting professionals involved in digital influence. The absence of specific regulation in Brazil contributes to the rise of contracts that may not be entirely trustworthy and accentuates the precariousness experienced by these workers.

The economic landscape in which influencers operate is marked by volatility and unorthodox income patterns. Variables such as financial instability, bargaining power in brand partnerships, and unpredictable workloads can blur the lines between employment and independent contracting. When analysing the economic realities faced by influencers, issues like revenue consistency, promotional commitments, and economic reliance on platform policies can all be indicative of a more traditional employer–employee dynamic. Conversely, the ability to foster multiple revenue streams and act as self-managed entrepreneurs could suggest a legitimate independent contractor status. Brazilian legal discourse must examine these economic factors comprehensively to discern whether influencers align more closely with standard employment dynamics or embody a new stratum of digital entrepreneurship.

Collaboration with brands, reliance on platform policy changes, and the pursuit of brand deals are elements that could point towards an employer-driven framework. However, influencers’ engagement in these activities, often without direct oversight or prescribed schedules, might equally suggest a level of entrepreneurial autonomy inconsistent with traditional employment.

⁷⁸ Mauricio Godinho Delgado and Gabriela Neves Delgado, ‘The parasubordination in labor law: Concept, objectives and juridical effects’ (2015) 1 *Law J Soc & Lab Rel* 138.

⁷⁹ *Ibid*, 151.

⁸⁰ Sanja Stojković-Zlatanović and Ivana Ostojić, ‘Labour law status of platform workers—between autonomy and subordination’ (2021) *Regional Law Review* 274.

In future deliberations, it's crucial that Brazilian courts and lawmakers reference established legal doctrines, consider comparative legal theories, and analyse precedents within and beyond national borders. Doing so will enrich the legal discourse surrounding digital influencers and provide a foundation for future legislation and judicial decisions that reflect the realities of modern work. This comprehensive legal approach would serve not only to clarify the status of influencers under current laws but could also pave the way for innovative legal frameworks that address the unique nature of work in the digital economy.

6 RECOMMENDATIONS

In response to the evolving landscape of the digital influencer industry within Brazil, a comprehensive reassessment of labour law is essential. This section sets forth a series of recommendations intended to refine existing legal frameworks and establish new protections that resonate with the specialised nature of digital influencer work.

First, an imperative step is the modernisation of Brazilian labour laws to explicitly include provisions that reflect the distinct attributes and professional circumstances unique to digital influencers. The creation of a novel legal category or classification, possibly encompassing the concept of para-subordination, could be instrumental. Such a measure would offer digital influencers legal recognition and rights while simultaneously acknowledging their atypical dynamics of subordination and their often autonomous working model.

In conjunction with crafting tailored legal categories, the establishment of clear and detailed guidelines outlining the rights and responsibilities of both digital influencers and the entities that engage them is of paramount importance. These guidelines would provide a safeguard against potential exploitation and contribute to the maintenance of equitable working conditions within the industry.

Moreover, the implementation of mechanisms for monitoring adherence to labour laws is critical. The utilisation of digital supervision techniques, aided by technology, could play a pivotal role in overseeing the execution of contracts, the accuracy and timeliness of payments, and the general work conditions of digital influencers. This would serve to reinforce compliance with existing labour legislation and protect influencers' entitlements.

Another essential element involves promoting transparency and accountability in dealings within the influencer industry. This might entail mandating the disclosure of algorithmic, metrics, and content moderation practices by companies. Additionally, offering digital influencers channels through which to dispute inappropriate account suspensions or terminations is vital in fostering an environment of fair treatment.

Lastly, educating digital influencers about their legal rights and responsibilities is crucial. This can be achieved through the facilitation of educational initiatives, including workshops, and comprehensive training modules that encompass a broad spectrum of relevant topics. By investing in such educational programs, digital influencers can enhance their understanding of contract negotiation, intellectual property rights, taxation issues, and health and safety regulations within the context of their profession. Knowledge empowerment among influencers will serve to build their capacity to navigate the evolving digital domain more effectively, ensuring they are well equipped to assert their rights and fulfil their responsibilities. This commitment to education is imperative in cultivating a well-informed influencer community that upholds the integrity and professional standards of the industry.

7 CONCLUSION

The evolving field of digital influencers within Brazil presents pressing challenges for existing labour law frameworks, underscoring the urgency to adapt to its unique characteristics. It is clear, from the analysis in this chapter, that traditional employment classifications inadequately capture the nuances of digital influencing work, potentially leaving influencers unprotected or inadequately protected under current legislations. The blurry classification of influencers as either employees or independent contractors is indicative of the significant legal ambiguities present within this digital age profession.

The concept of para-subordination has been suggested as a potential regulatory approach in acknowledging the non-traditional subordination dynamics and providing legal status to digital influencers. However, it is vital to consider the unique local context within Brazil before making any legislative amendments. Therefore, further detailed and robust empirical research into the working conditions and industry dynamics of digital influencers in Brazil is essential.

Furthermore, alongside sector-specific adaptations, multidimensional strategies encompassing education, transparency, and digital supervision mechanisms, among others, should be adopted to foster industry integrity, protect worker rights, and promote industry growth.

In sum, addressing the distinct labour law implications and challenges involved in regulating the digital influencer market in Brazil demands innovative, nuanced, and contextually informed regulatory approaches. This chapter serves as an impetus for continued academic, legislative, and industry discussions towards achieving these requisite adaptations. It is a clarion call to protect a vulnerable workforce operating at the front line of the digital age, an age that is redefining traditional conceptions of work and employment.

11. Content creators and digital platforms: The potential of selected EU frameworks to address the issues of digital labour beyond platform work

Tjaša Petročnik

1 INTRODUCTION

Content creation is a coveted activity that many young people envision as their preferred career. In part, it is enabled by the contemporary internet that allows people to take part not only in content consumption, but increasingly in its production.¹ However, what usually starts as a passion project – filming makeup tutorials, reviewing tech gadgets, vlogging one’s daily life – can quickly lead to an impression of unfairly being taken advantage of;² the digital modes of creativity like content creation are often couched in terms of creative freedom and self-expression, while requiring significant time and energy investment. This includes not only the production of content, but also building your online image and engaging with your audience.³ Some authors thus argue that these

¹ Angela Daly, ‘The Internet, User Autonomy and EU Law’ in *Private Power, Online Information Flows and EU Law: Mind the Gap* (Hart 2016) <<https://ssrn.com/abstract=2780789>> accessed 12 December 2023, 15–17.

² Namely, while content creators are expected to do “the job of 10 people”, including that of photographer or videographer, writer, producer, editor, stylist and makeup artist, and community manager, they are often not even compensated for the job of one of these roles. In Amelia Tait, “‘Influencers are being taken advantage of’: the social media stars turning to unions” (*The Guardian*, 10 October 2020) <<https://www.theguardian.com/media/2020/oct/10/influencers-are-being-taken-advantage-of-the-social-media-stars-turning-to-unions>> accessed 12 December 2023, referring mainly to influencers’ brand deals.

³ Brooke Erin Duffy, ‘The romance of work: Gender and aspirational labour in the digital culture industries’ (2016) 19 *International Journal of Cultural Studies* 441.

efforts constitute (free) labour that is being exploited by digital platforms,⁴ for which content creators receive a disproportionately low or even no financial compensation.⁵

This contribution looks into content creation on/for YouTube and scrutinises its revenue model against the notion of digital labour and critical theories that consider platforms as something both facilitating creativity and innovation, and channelling these practices into modes that profit the platform.⁶ By focusing on the relationship between the digital platform and the content creator, I explore what options are afforded to content creators under different regulatory regimes on the EU level to ensure they would receive a fair(er) share of the advertisement revenue their content draws to the platform.⁷ Since content creators are not considered YouTube's employees, which would situate the discussion in employment law considerations,⁸ I explore how else the relationship between the platform and content creators could be understood. Therefore, I examine the scope for addressing the issue of digital labour under the EU platform regulation, consumer protection, and competition law frameworks as EU legal regimes that engage with the notion of (un)fairness.⁹

The chapter is structured as follows: following this introduction, section 2 provides the conceptual framing for the discussion by describing content creation in the context of the digital economy and YouTube's revenue model, and grounds content creation in theoretical accounts of digital labour. In section 3, I assess the selected EU regulatory frameworks and their scope to engage with the (un)fairness of digital labour. Section 4 concludes.

⁴ See, e.g., Christian Fuchs, 'Labour in informational capitalism and on the internet' (2010) 26 *The Information Society* 179; Tiziana Terranova, 'Free Labor: Producing Culture for the Digital Economy' (2000) 18 *Social Text* 33.

⁵ Panji Mulkillah Ahmad and others, 'Digital labour: Digital capitalism and the alienation of YouTube content creators' (2021) 3 *Journal of Asian Social Science Research* 167.

⁶ Jean-Cristophe Plantin and others, 'Infrastructure studies meet platform studies in the age of Google and Facebook' (2016) 20 *New Media & Society* 293.

⁷ See Mulkillah Ahmad and others (n 5).

⁸ See, to this end, Catherine Barnard, 'The serious business of having fun: EU legal protection for those working online in the digital economy' (2023) 39 *International Journal of Comparative Labour Law and Industrial Relations* 125; Valerio de Stefano and Antonio Aloisi, 'European Legal framework for digital labour platforms' (European Commission 2018).

⁹ See in Andreas Häuselmann and Bart Custers, 'Substantive fairness in the GDPR: Fairness Elements for Article 5.1a GDPR' (2024) 52 *Computer Law & Security Review*.

2 DIGITAL PLATFORMS AND CONTENT CREATION

On YouTube, more than a billion hours are spent each day watching videos; every minute, more than 400 hours of content are uploaded to the platform.¹⁰ This content is produced not by the platform itself, but by content creators: “digitally enabled cultural producers who create and circulate content on social media platforms, driven by an entrepreneurial spirit, authenticity, and the desire to self-realise and generate their own ‘media brands’.”¹¹ For their work, content creators can be financially rewarded in various ways;¹² this contribution focuses on one of the possible forms of content monetisation: revenue-sharing policies digital platforms have in place, enabling content creators to earn income from the platform’s advertising revenue.¹³

In economic terms, the business model of digital platforms can be explained with reference to multi-sided markets that enable the interaction between two or more distinct parties.¹⁴ As such, platforms are central intermediaries

¹⁰ Arieetz Dutta, ‘YouTube Business Model. How Does YouTube Make Money?’ (*Freedough*, 14 June 2022) <<https://www.freedough.com/youtube-business-model-how-does-youtube-make-money/>> accessed 7 June 2024.

¹¹ (Craig in) Arturo Arriagada and Francisco Ibáñez, “‘You need at least one picture daily, if not, you’re dead’: Content creators and platform evolution in the social media ecology” (2020) *Social Media + Society*. As posited, the democratisation of content creation is in part owed to technological developments that decreased the costs of production and increased access to film-making and editing equipment. See I. India Thusi, ‘Reality porn’ (SSRN, 2021) NYU Law Review 2021. Indiana Legal Studies Research Paper Forthcoming <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3861979> accessed 7 June 2024.

¹² For instance, they can receive revenue from selling own merchandise, fan funding and memberships, and brand partnerships and affiliate marketing. Catalina Goanta and Isabelle Wildhaber, ‘Controlling influencer content through contracts: A qualitative empirical study on the Swiss influencer market’, in Catalina Goanta and Sofia Ranchordás (eds), *The Regulation of Social Media Influencers* (Elgar 2020); Tatjana Hödl and Thomas Myrach, ‘Content creators between platform control and user autonomy. The role of algorithms and revenue sharing’ (2023) 65 *Business & Information Systems Engineering* 497; Giovanni Paganini et al., ‘YouTuber: A new work conception’ (2021) 11 *Research on Humanities and Social Sciences* 33.

¹³ Hödl and Myrach (n 12).

¹⁴ Rochet and Tirole in Anne Helmond, ‘The platformization of the web: Making web data platform ready’ (2015) 1 *Social Media + Society*.

providing and governing the space for these interactions.¹⁵ In the case at hand, YouTube brings together content creators that use the digital platform to showcase their content and grow their online community; the viewers that wish to watch videos; and advertisers that seek to access viewers' attention.¹⁶ Consequently, this intermediating role is essential for understanding the firms' revenue model: while for the viewers and content creators the use of the platform is free, the advertisers pay for the 'eyeballs' they reach.¹⁷ In other words, the platform relies on content to bring viewers to spend time on the platform, to display the ads thereon, and to match consumers and advertisers. Even though the viewers do not pay for content, some pay attention to ads, and this ability to reach potential consumers is what is sold to the advertisers.¹⁸ From the perspective of the relationship between the digital platform and the content creator, the just-described tenets of attention economy indicate that the relationship is mutually configured:¹⁹ while the platform is essential for content creators to share their work,²⁰ the platform is also dependent on the content creators for uploading content to actually turn profit.²¹ Said differently, content creators procure the key element that attracts viewers' attention, to be

¹⁵ Catalina Goanta and Gerasimos Spanakis, 'Influencers and Social Media Recommender Systems: Unfair Commercial Practices in EU and US Law' (*SSRN*, 2020) TTLF Working Paper No. 54 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3592000> accessed 7 June 2024.

¹⁶ See, e.g., Aitor Jiménez González, 'Law, code and exploitation: How corporations regulate the working conditions of the digital proletariat' (2022) 48 *Critical Sociology* 361. See also Giuseppe Mazziotti, 'What is the future of creators' rights in an increasingly platform-dominated economy?' (2020) 51 *International Review of Intellectual Property and Competition Law* 1027.

¹⁷ Giuseppe Colangelo and Mariateresa Maggolino, 'Data protection in attention markets: Protecting privacy through competition?' (2017) 8 *Journal of European Competition Law & Practice* 363.

¹⁸ David S. Evans, 'Attention platforms, the value of content, and public policy' (2019) 54 *Review of Industrial Organization* 775. In this sense, the platform exploits the indirect network effects to cross-finance its services. See in Colangelo and Maggolino (n 17).

¹⁹ Arriagada and Ibáñez (n 11); Jovana Karanović, Hans Berends, and Yuval Engel, 'Regulated dependence: Platform workers' responses to new forms of organizing' (2020) 58 *Journal of Management Studies* 1070.

²⁰ Arriagada and Ibáñez (n 11).

²¹ Susanne Kopf, '"Rewarding good creators": Corporate social media discourse on monetization schemes for content creators' (2020) 6 *Social Media + Society*.

turned into a sellable product by the platform.²² This also implies that digital platforms are incentivised to provide access to as much content as possible to generate more traffic and engagement and get more advertising money.²³

To entice content creators to deliver the videos, that is, the raw material used by the digital platform to enhance its brand and profits,²⁴ YouTube established a ‘partner programme’ through which creators can earn money from ads once they hit a certain number of subscribers and watch hours. Once accepted to the programme, YouTube pays content creators based on the number of ad views a video receives, that is, the exposure generated for advertising.²⁵ The exact amount of revenue is uncertain and difficult to determine and is dependent on factors such as traffic, watch-through rate, type of content, viewers’ location, and bidding within Google’s ad auction mechanism.²⁶ Moreover, the platform provides different advertising modules like watch page ads or short feed ads with different revenue share rates: 55 per cent and 45 per cent paid to the content creator, respectively. The speculation is that US-based creators on average earn US\$10–30 per 1,000 (ad) views.²⁷ What is more, the platform can also monetise videos that are not part of the partner programme, meaning that the creators of those videos do not participate in revenue-sharing.

²² Tobias Olsson, ‘In a community, or becoming a commodity? Critical reflections on the “Social” in social media’, in Leif Kramp et al. (eds), *Media Practice and Everyday Agency in Europe* (edition lumière 2014), 312. In this sense, they can be referred to as ‘producers’ (also prosumers) that produce surplus value that can be appropriated and turned into profit by corporations without paying due wages. Christian Fuchs, ‘A contribution to the critique of the political economy of google’ (2011) 8 *Fast Capitalism* 31.

²³ See, e.g., Giorgio Monti, ‘Attention Intermediaries: Regulatory Options and their Institutional Implications’ (2020) TILEC Discussion Paper No. DP2020-018.

²⁴ See in Mark Andrejevic, ‘Exploiting YouTube: Contradictions of User-generated Labor’, in Pelle Snickars and Patrick Vonderau (eds), *The YouTube Reader* (The National Library of Sweden, Stockholm 2009).

²⁵ YouTube Help, ‘YouTube Partner Earnings Overview’ (2024) <<https://support.google.com/youtube/answer/72902?hl=en#zippy=%2Chow-do-i-earn-revenue%2Cwhats-my-revenue-share%2Cwhere-can-i-view-my-earnings%2Chow-can-i-get-paid>> accessed 7 June 2024.

²⁶ As stated, “[t]here are no guarantees under the YouTube partner agreement about how much or whether you’ll be paid. Earnings are generated based on a share of advertising revenue from viewers watching your video.” Ibid.

²⁷ Colleen Christison, ‘How Much Does YouTube Pay Per View? We Tested It!’ (*Hootsuite*, 14 November 2023) <<https://blog.hootsuite.com/how-much-does-youtube-pay-per-view/>> accessed 7 June 2024.

It is estimated that over 80 per cent of YouTube channels do not qualify for monetisation.²⁸

2.1 Content Creators as Platforms' Digital Labourers

Theoretically, this mutually configured relationship between the digital platform and the content creator can be examined through the lens of digital labour. For some authors, this concept is “endowed with a sense of autonomy”,²⁹ flexibility, freedom,³⁰ and participation in peer production. Others contextualise it within the production of value through interaction with digital platforms³¹ and consider digital labour exploitative.³² Digital labour in this view pertains to the ways in which the platform facilitates a particular practice, while simultaneously converting its users' activities into (surplus) value that is channelled “into modes that profit the platform's creators”.³³ Some examples of digital labour include (unpaid) social media use, but also (paid) work for gig platforms that mediate, for instance, food delivery or various freelance tasks and may indeed include content creation for platforms like Instagram or YouTube.³⁴

To illustrate, for a short video, YouTubers could spend days researching and writing the script, sourcing the necessary materials, directing, producing, and editing the video, promoting it, responding to comments, etc, all at a regular

²⁸ Mulkillah Ahmad and others (n 5) at 176; Barnard (n 8); Mazziotti (n 16).

²⁹ Andrejevic in David Hesmondhalgh, ‘User-generated content, free labour and the cultural industries’ (2010) 10 *Ephemera* 267.

³⁰ Saori Shibata, ‘Gig work and the discourse of autonomy: Fictitious freedom in Japan's digital economy’ (2019) 25 *New Political Economy* 535, focusing specifically on ‘gig work’.

³¹ Alessandro Gandini, ‘Digital labour: an empty signifier?’ (2020) 43 *Media, Culture & Society* 369; Niels van Doorn, ‘Platform labor: on the gendered and racialized exploitation of low-income service work in the “on-demand” economy’ (2017) 20 *Information, Communication & Society* 898.

³² See in Adam Fish and Ramesh Srinivasan, ‘Digital labour is the new killer app’ (2011) 14 *New Media & Society* 137.

³³ Plantin and others (n 6). See also Brian Fabo, Jovana Karanovic, and Katerina Dukova, ‘In search of an adequate European policy response to the platform economy’ (2017) 23 *Transfer: European Review of Labour and Research* 163; Hector Postigo, ‘The socio-technical architecture of digital labor: Converting play into YouTube money’ (2014) 18 *New Media & Society* 332; Tiziana Terranova, ‘Free labor: Producing culture for the digital economy’ (2000) 18 *Social Text* 33.

³⁴ See further, Robert Dorschel, ‘Reconsidering digital labour: Bringing tech workers into the debate’ (2022) 37 *New Technology, Work and Employment* 288.

and consistent rate, in order to not be ‘forgotten’ by YouTube’s algorithm. In addition to planning and creating content, YouTubers also need to acquire and maintain their filming equipment, manage their online brand and their channel, and engage with and build their audiences.³⁵ Ultimately, their efforts draw viewers’ ‘eyeballs’ to the platform and its advertising purposes.³⁶ The content creator bears the costs of content production and associated work, and in return they get free access to the infrastructure, a community through which they can further leverage their brand for marketing deals, and a portion of the ad revenue. Conversely, the platform needs to maintain its infrastructure, and is, while outsourcing content creation to the content creator, able to sell the content to viewers in return for their data to further advance its ad-based revenue model and for a monetary amount to advertisers through the ad auction mechanism.³⁷

Exploring how the value is created on the web through the way transactions are enabled, Pfeiffer points out that key to digital platforms’ profit is precisely the human labour involved in content creation.³⁸ The creators produce the

³⁵ Mulkillah Ahmad and others (n 5) at 176; Barnard (n 8) at 131; Giovani Paganini et al., ‘Youtuber: A new work conception’ (2021) 11 *Research on Humanities and Social Sciences* 33.

³⁶ Fabian Hoose and Sophie Rosenbohm, ‘Self-representation as platform work: Stories about working as social media content creators’ (2023) *Convergence: The International Journal of Research into New Media Technologies*. See also YouTube Help, ‘YouTube channel monetization policies’ (2024) <<https://support.google.com/youtube/answer/1311392#zippy=%2Cchow-well-inform-you-of-actions-that-affect-your-monetization%2Cfollow-the-youtube-community-guidelines%2Cfollow-our-program-policies%2Ccreator-responsibility>> accessed 7 June 2024.

³⁷ See in Christian Fuchs, ‘Dallas Smythe today – The audience commodity, the digital labour debate, marxist political economy and critical theory. prolegomena to a digital labour theory of value’ (2012) 10 *tripleC* 692, recounting the work of Smythe and its relevance in the context of the digital economy. See also David S. Evans, ‘Attention platforms, the value of content, and public policy’ (2019) 54 *Review of Industrial Organization* 775.

³⁸ See Sabine Pfeiffer, ‘Web, value and labour’ (2013) 7 *Work Organisation, Labour & Globalisation* 12. See further Andrea Miconi and Marco Marrone, ‘Digital surplus: Three challenges for digital labor theory’, in Elinor Wahal (ed) *Unboxing AI: Understanding Artificial Intelligence* (Fondazione Giangiacomo Feltrinelli 2021), noting that “with technological development we are increasingly witnessing an expansion of the ability of capitalism to exploit human activities”. See also Terranova in David Hesmondhalgh, ‘User-generated content, free labour and the cultural industries’ (2010) 10 *Ephemera* 267.

content, that is, a product with use-value that satisfies certain human needs.³⁹ This is then quantified as exchange-value on the marketplace. In the digital economy, the latter value seems to dominate the narrative; while the relevance and costs of human work involved in content creation seem to remain concealed, the metrics for the generation and allocation of revenue are expressed in prices per ad view.⁴⁰ Still, the fact that the relationship between the platform and the content creator is mutually configured and both parties derive advantages from it does not mean that the interests of these two parties are always aligned, since the former seeks to, primarily, maximise the benefits for its (potential) paying customers and/or for themselves.⁴¹ In digital capitalism, exploitation might therefore occur when the digital platform appropriates the surplus value from content creation,⁴² which could be the case even if the content creator partakes in ad revenue-sharing. The digital labour vantage point thus invites the following inquiries: are content creators remunerated fairly for their labour, is the relationship between the platform and content creators based on fair terms and, subsequently, is the (financial) value that stems from content creation distributed in a fair manner?⁴³ Consequently, instrumentalising an individual and their capacities for the platform's own advantage could be seen as unfair; while indeed both parties to the exchange might benefit from the relationship, one could be considered to be disadvantaged "by some applied standard of equity or equality",⁴⁴ pointing to possible exploitation.

3 EU REGIMES APPLICABLE TO THE RELATIONSHIP BETWEEN DIGITAL PLATFORM AND CONTENT CREATORS

As indicated above, I do not situate the relationship between the digital platform and content creator in an employment law context. To this end,

³⁹ See Christian Fuchs and Marisol Sandoval, 'Digital workers of the world unite! A framework for critically theorising and analysing digital labour' (2014) 12 *tripleC* 486.

⁴⁰ See also Sabine Pfeiffer, 'Digital labour and the use-value of human work. On the importance of labouring capacity for understanding digital capitalism' (2014) 12 *tripleC* 599, 600–601.

⁴¹ Zysman and Kenney in Hoose and Rosenbohm (n 36).

⁴² See in Fuchs (n 37).

⁴³ See further Adam Arvidsson and Elanor Colleoni, 'Value in informational capitalism and on the internet' (2012) 28 *The Information Society* 135.

⁴⁴ Buchanan in Christian Fieseler, Eliane Bucher, and Christian Pieter Hoffmann, 'Unfairness by design? The perceived fairness of digital labor on crowdworking platforms' (2019) 156 *Journal of Business Ethics* 991.

Barnard summarises whether content creators could be considered ‘employees’, concluding this is most probably not the case since they themselves bear the (financial) risks related to the exercise of their activity. While a platform like YouTube does exert a level of control over content creation, for example concerning what content is trending, she suggests it is merely “a means to an end rather than the source of the employment”, in which case YouTubers are, at best, self-employed and in a commercial relationship with the platform.⁴⁵ Importantly for the present discussion, she also assesses whether content creators could be classified as ‘platform workers’ under the proposed EU Platform Work Directive,⁴⁶ likewise concluding that this is most probably not the case. She notes, however, that if they are classified as ‘persons performing platform work’ – a definition that concerns any individual performing platform work irrespective of the nature of the contractual relationship – the proposed directive could provide some procedural protection from the perspective of transparency and accountability.⁴⁷ The present contribution builds upon the work of Barnard, further discussing whether the below-analysed regimes could provide protection in the sense of ensuring substantive fairness when it comes to remuneration for digital labour.

Against this background, this section focuses on the application and scope of obligations of digital platforms towards content creators in the framework of a commercial or contractual relationship; concretely I look into EU platform regulation, consumer protection, and competition law regimes, discuss in what way the relationship between the platform and content creator could be classified for the purposes of their application, and what the implications of such classification would be, and explore to what extent their provisions are relevant and suitable to provide the protection against exploitation of content creators concerning the fair(er) remuneration for the digital labour they perform.

⁴⁵ Barnard (n 8) at 127–28. As suggested, an employment relationship would require delivering upon the predefined tasks in the context of subordination, whereas content creation is an activity based on independence, flexibility, and self-realisation, for which the digital platform merely provides the tools for coordination and networking. See in Patrick Dieuaide and Christian Azaïs, ‘Platforms of work, labour, and employment relationship: The grey zones of a digital governance’ (2020) 5 *Frontiers in Sociology*. See also Mulkillah Ahmad and others (n 5); Duffy (n 3).

⁴⁶ See Paula Soler, ‘EU deal on new gig-workers rules unlikely before June elections’ (*EUObserver*, 16 February 2023) <<https://euobserver.com/digital/158099>> accessed on 7 June 2024.

⁴⁷ Barnard (n 8) at 136–39.

3.1 The EU Platform Regulation Framework

In recent years, the EU has introduced several instruments to regulate digital platforms and the way in which they behave towards their (business) users; this section analyses the rules considering content creators is classified as platforms' (business) users. First, the Platform-to-business (P2B) Regulation⁴⁸ is the EU's "first ever set of rules creating a fair, transparent, and predictable business environment for smaller businesses and traders on online platforms".⁴⁹ It puts forward information and transparency obligations for platforms and redress avenues for their business users.⁵⁰ The latter are defined as individuals acting in a commercial or professional capacity, offering goods or services to consumers,⁵¹ indicating that content creators might not benefit from its provisions if they are not producing content in their commercial or professional capacity as a service to consumers.⁵² Conversely, if content creators are considered business users,⁵³ the providers of online intermediation services shall ensure their terms and conditions are easily available and understandable, inform business users about any possible changes to the terms and conditions, provide transparency as regards ranking and differentiated treatment, and enable them access to a complaint-handling system and mediation. With regards to fairness of the contractual relations between the two parties specifically, the Regulation states that terms and conditions should not be retroactively changed and must include information on how to terminate the contractual relationship.⁵⁴

Second, the EU Digital Services Package⁵⁵ includes rules that could also be relevant in the present context, should content creators not fall within the

⁴⁸ Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services [2019] OJ L 186 (P2B Regulation).

⁴⁹ 'Platform-to-business trading practices' (*European Commission*, 2023) <<https://digital-strategy.ec.europa.eu/en/policies/platform-business-trading-practices>> accessed 7 June 2024.

⁵⁰ P2B Regulation, Article 1.

⁵¹ P2B Regulation, Article 2(1).

⁵² See further Paola Iamicelli, 'Online platforms and the digital turn in EU contract law: unfair practices, transparency and the (pierced) veil of digital immunity' (2019) 15 *European Review of Contract Law* 392, 401, 404–5. See also Barnard (n 8).

⁵³ E.g. if offering merchandise to viewers/consumers. See in Barnard (n 8).

⁵⁴ P2B Regulation, Articles 3–14.

⁵⁵ 'The Digital Services Act package' (*European Commission*, 2023) <<https://digital-strategy.ec.europa.eu/en/policies/digital-services-act-package>> accessed on 12 December 2023.

scope of the P2B Regulation.⁵⁶ The package consists of two instruments: first, the Digital Service Act (DSA)⁵⁷ regulates the provision of online intermediary services by establishing a framework for liability exemptions and due diligence obligations regarding the design and operation for providers of intermediary services.⁵⁸ The DSA applies to platforms offered to recipients, which are understood broadly as business users, consumers, and other users.⁵⁹ The provisions particularly relevant in the relationship between digital platform and content creator include information provision as regards the terms and conditions concerning content moderation and handling complaints, as well as concerning any possible restrictions on content visibility.⁶⁰ Further, the Act provides rules on the internal complaint-handling system and dispute settlement process, outlining how platforms' decisions can be challenged.⁶¹ Second, the Digital Markets Act (DMA)⁶² regulates the conduct of 'gatekeepers', powerful firms that act as gateways between businesses and consumers. The DMA applies to 'core platform services' provided by gatekeepers, spelling out the obligations that aim to ensure fairness on and contestability of digital markets.⁶³ As a gatekeeper, Alphabet provides several core platform services, including YouTube (video-sharing) and online advertising, and is subject to the DMA's obligations.⁶⁴ The DMA's fairness objective seems key in this regard, since it addresses "an imbalance between the rights and obligations of business users where the gatekeeper obtains a disproportionate advantage".⁶⁵ As posited, however, the DMA's obligations seem to be couched mainly as procedural

⁵⁶ Barnard (n 8).

⁵⁷ Regulation (EU) 2022/2065 on a Single Market For Digital Services and amending Directive 2000/31/EC [2022] OJ L 277 (DSA).

⁵⁸ DSA, Article 1. See also Martin Husovec and Irene Roche Laguna, 'Digital Services Act: A Short Primer' (*SSRN*, 2022) <<https://ssrn.com/abstract=4153796>> accessed 7 June 2024; Martin Husovec, 'The DSA as a creator's charter?' (2023) 18 *Journal of Intellectual Property Law & Practice* 71.

⁵⁹ DSA, Recital 2 and Article 2.

⁶⁰ DSA, Articles 14, 17, 27. See also Barnard (n 8); Rachel Griffin, 'The Law and political economy of online visibility. Market justice in the digital services act' (2023) *Technology & Regulation*.

⁶¹ DSA, Articles 20 and 21.

⁶² Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 [2022] OJ L 265 (DMA).

⁶³ DMA, Articles 1–3.

⁶⁴ European Commission, 'Gatekeepers' (2024) <https://digital-markets-act.ec.europa.eu/gatekeepers_en> accessed 7 June 2024.

⁶⁵ DMA, Recital 33.

requirements, aiming to ensure a more level and transparent playing field,⁶⁶ rather than expressly regulating the applicable conditions that would indicate fairness's distributive role,⁶⁷ at least in relation to content creators specifically. In sum, the instruments just described could provide a (novel) dimension of protection for content creators,⁶⁸ but this protection seems limited to ensuring fairness in a procedural sense; they guarantee a level of transparency and information concerning the terms upon which the relationship is built and establish complaint mechanisms, but do not directly challenge the remuneration practices and (un)fair allocation of value on digital platforms.

3.2 The Affordances Under EU Consumer Protection Law

Content creators are users of a digital platform's services, which the digital platform provides in the course of their commerce or business activities.⁶⁹ Thus, if considered *consumers*,⁷⁰ content creators could be entitled to protection under the EU consumer *acquis*, since consumer is a subject considered

⁶⁶ To this end, the obligations, for instance, prohibit gatekeepers from imposing that users use or subscribe to certain own services of the gatekeeper; requires that the gatekeepers provide information to advertisers and publishers regarding pricing conditions and remuneration metrics; requires that they provide access to performance measurements and (access to) data generated through users' activity, etc. The DMA does mandate that the gatekeeper applies "fair, reasonable, and non-discriminatory general conditions of access for business users", but this is applicable explicitly to software application stores, online search engines, and online social networking. For this, a dispute settlement mechanism should also be envisioned. See DMA, Articles 5 and 6.

⁶⁷ Nicolas Petit, 'The Proposed Digital Markets Act (DMA): A Legal and Policy Review' (SSRN, 2021) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3843497> accessed 7 June 2024.

⁶⁸ Barnard (n 8); Husovec (n 58).

⁶⁹ While this would include gainful activity, an argument could be made, for present purposes, that this could also include content creation, since in return for the use of the platform, content creators procure videos that are monetised by advertisers who compete for viewers' attention. See Case C-59/12 *BKK Mobil Oil Körperschaft des öffentlichen Rechts v Zentrale zur Bekämpfung unlauteren Wettbewerbs eV* [2013] ECLI:EU:C:2013:634.

⁷⁰ Individuals not engaged in commercial or trade activities that are reasonably well informed, observant, and circumspect. Case C-59/12 *BKK Mobil Oil Körperschaft des öffentlichen Rechts v Zentrale zur Bekämpfung unlauteren Wettbewerbs eV*; Case C-210/96 *Gut Springenheide GmbH and Rudolf Tuský v Oberkreisdirektor des Kreises Steinfurt – Amt für Lebensmittelüberwachung* [1998] ECR I-04657.

to be in a position of economic and informational asymmetry in relation to a trader.⁷¹ Content creators as consumers could be protected from unfair business-to-consumer (B2C) commercial practices, defined as actions, omissions or other conducts, performed by a trader before, during, or after the sale or supply of a product or service to a consumer.⁷² The updated Unfair Commercial Practices Directive prohibits practices that are unfair, if they are contrary to the requirements of professional diligence, i.e. referring to a standard of a trader's expected special skill and care, and if they materially distort the (average) consumer's economic behaviour. Particularly, the Directive specifies as unfair practices that are misleading, i.e. containing false information, or aggressive, i.e. coercive.⁷³ Thus, a commercial relationship would be unfair if the stronger party would interfere with the average consumer's capacity to make informed autonomous decisions.⁷⁴ Additionally, in their role as consumers, content creators would be entitled to clear and comprehensible information concerning their transaction.⁷⁵ Consumer protection aims to support the consumer in their commercial transactions with informational and procedural guarantees, but, as above, these provisions are less relevant for the issues related to (challenging) the terms of determining and allocating the remuneration for digital labour.

3.3 A Possible EU Competition Law Intervention

Lastly, EU competition law could provide another possible avenue to address the issues related to digital labour, especially those that stem from “unfair

⁷¹ Case C-59/12 *BKK Mobil Oil Körperschaft des öffentlichen Rechts v Zentrale zur Bekämpfung unlauteren Wettbewerbs eV*; Case C-147/16 *Karel de Grote – Hogeschool Katholieke Hogeschool Antwerpen VZW v Susan Romy Jozef Kuijpers* [2018] ECLI:EU:C:2018:320.

⁷² Directive (EU) 2019/2161 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU as regards the better enforcement and modernisation of Union consumer protection rules (2019) OJ L 328 (Modernisation Directive), Articles 2 and 3. For the definition of a trader, see Case C-105/17 *Komisija za zashtita na potrebitelite v Evelina Kamenova* [2018] ECLI:EU:C:2018:808, understanding it as a functional concept that requires a determination of whether the contractual relationship is amongst the activities a party provides in the course of their trade, business, or profession.

⁷³ UCPD, Articles 5–9.

⁷⁴ Häuselmann and Custers (n 9).

⁷⁵ Directive 2011/83/EU on consumer rights [2011] OJ L 304, Articles 5–8.

transfers of wealth”.⁷⁶ Namely, competition law is usually relied upon against firms amassing economic and other kinds of power to the detriment of consumers, competitors, and suppliers.⁷⁷ Considering content creators supply videos to the digital platform, they could be constituted as a *trading party*.⁷⁸ In this light, the prohibition of abuse of dominance contained in Article 102 TFEU is relevant, specifically its capacity to target market conduct that indicates the dominant firm⁷⁹ taking advantage of its market position to earn (undue) monopoly profits at the expense of its customer,⁸⁰ or, in this case, trading partner. Should YouTube be found dominant for the purposes of com-

⁷⁶ Ariel Ezrachi, ‘EU Competition Law Goals and the Digital Economy’ (2018) Oxford Legal Studies Research Paper No. 17/2018, 16.

⁷⁷ Stefan Larsson, ‘Putting trust into antitrust? Competition policy and data-driven platforms’ (2021) 36 *European Journal of Communication* 391; ‘The Creators Issue’ (*The Verge*, 2019) <<https://www.theverge.com/2019/4/1/18286786/creators-issue-youtubers-influencers-instagram-podcast-tiktok-how-to>> accessed 7 June 2024. See also Mazziotti (n 16).

⁷⁸ Note that EU competition law has already established that if one is not considered a ‘worker’, they are necessarily an undertaking, unless they are “in fact ‘false self-employees’”. See Case C-413/13 *FNv Kunsten Informatie en Media v Staat der Nederlanden* [2014] ECLI:EU:C:2014:2411. See further Ioannis Lianos, Nicola Countouris, and Valerio De Stefano, ‘Re-Thinking the Competition Law/Labour Law Interaction Promoting a Fairer Labour Market’ (*SSRN*, 2019) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3465996> accessed 7 June 2024. In this light, the notion of a trading party could be constituted with reference to service provision and some sort of return for it. See Pinar Akman, ‘The theory of abuse in google search: A Positive and normative assessment under EU competition law’ (2017) 2 *University of Illinois Journal of Law, Technology & Policy* 301, 330–31.

⁷⁹ As stated in *United Brands*, and repeated since, a dominant market position refers to “a position of economic strength enjoyed by an undertaking enabling it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers”. Case 27/76 *United Brands Company and United Brands Continentaal BV v Commission of the European Communities* [1978] ECR 207, para 65. Importantly, competition law adopts a broad understanding of the term consumer, including also (intermediate) buyers, customers, and final consumers.

⁸⁰ Harri Kalimo and Klaudia Majcher, ‘The concept of fairness: Linking EU competition and data protection law in the digital marketplace’ (2017) 47 *European Law Review* 210, 223; Viktoria H.S.E. Robertson, ‘Excessive Data Collection: Privacy Considerations and Abuse of Dominance in the Era of Big Data’ (*SSRN*, 2019) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3408971> accessed 7 June 2024.

petition law,⁸¹ the exploitation of digital labour could be examined under the prohibition of (exploitative) abuse of dominance. Namely, the central position of the digital platform as a multi-sided market importantly enables it to define the relationship with its users, monetise the transactions thereon, and capture the portion of the value.⁸² Accordingly, the abuse could be constructed as an imposition of unfair trading conditions in the sense of Article 102(a) TFEU,⁸³ through assessing the relevant terms of YouTube's revenue-sharing policy. While this is a relatively rarely used provision,⁸⁴ case law and decisional practice nonetheless provide some guidance in this regard.⁸⁵

Concretely, it is usually the imposition of unfair trading conditions itself rather than their effect that legitimises intervention. Next, the direct concern of this provision has almost always been with customers or suppliers of the dominant undertaking, rather than with (end) consumers or even competitors,⁸⁶

⁸¹ In general, dominant market position is established by referring to the firm's market shares, with very large market shares indicating dominance. In terms of numbers, this "is the case where there is a market share of 50%". See Case C-62/86 *AKZO Chemie BV v Commission of the European Communities* (1991) ECR I-03359, para 60. For an assessment, see, e.g., Peter Suciu, 'YouTube Remains The Most Dominant Social Media Platform' (*Forbes*, 7 April 2021) <<https://www.forbes.com/sites/petersuciu/2021/04/07/youtube-remains-the-most-dominant-social-media-platform/?sh=29b0b38e6322>> accessed 7 June 2024.

⁸² See, e.g., Michael G. Jacobides, 'What Drives and Defines Digital Platform Power? A framework, with an illustration of App dynamics in the Apple Ecosystem' (2021) Evolution White Paper <<https://www.evolutionltd.net/post/what-drives-and-defines-digital-platform-power>> accessed 7 June 2024.

⁸³ Which states that the prohibited abuse of dominance may consist in "directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions" upon its trading partners or customers.

⁸⁴ Giulia Schneider, 'Testing Art. 102 TFEU in the Digital Marketplace: Insights from the Bundeskartellamt's investigation against Facebook' (2018) 9 *Journal of European Competition Law & Practice* 213, 215. See also Nick Economides and Ioannis Lianos, 'Restrictions on Privacy and Exploitation in the Digital Economy: A Competition Law Perspective' (2019) CLES Research Paper Series 5/2019, 50.

⁸⁵ For this subject, the cases on collecting societies, i.e. associations that manage copyright on behalf of rights holders and collect and distribute payments made by users of their works, are relevant. See, e.g., Lucie Guibault and Stef van Gompel, 'Collective management in the European Union', in Daniel Gervais (ed), *Collective Management of Copyright and Related Rights*, 2nd edition (Kluwer Law International 2010), and below.

⁸⁶ See Sara Abdollah Dehdashti, 'B2B unfair trade practices and EU competition law' (2018) 14 *European Competition Journal* 305.

making it especially relevant for the case at hand. The legal test itself hinges on establishing unfairness on a case-by-case basis;⁸⁷ namely, the trading conditions can be considered unfair and therefore abusive if they go beyond absolute necessity for achieving one party's objective usually by restriction of the other party's rights and freedoms;⁸⁸ if they are arbitrary, one-sided, unjustifiably broad, or unrelated to the purpose of the relationship;⁸⁹ if there is disproportionality between interests, especially concerning the disparity in economic strength;⁹⁰ and objective justification is lacking.⁹¹ When an abuse is found, the firm may be required to bring infringement to an end and an effective and proportionate remedy imposed.⁹² This could, if the revenue-sharing policy of YouTube would indeed be found unfair, pertain to a recalculation or renegotiation of a fair share of revenues to more directly reflect the efforts invested in content creation, beyond its exchange-value established in the ad auction process, striking a more appropriate, and thus fairer, balance between the interests of the platform and content creators.⁹³

The approach of the French competition authority in *Google News*⁹⁴ can be illustrative. The authority went after Google that, among search results,

⁸⁷ Häuselmann and Custers (n 9).

⁸⁸ Case 127/73 *Belgische Radio en Televisie in société belge des auteurs, compositeurs et éditeurs v SV SABAM and NV Fonior* [1974] ECLI:EU:C:1974:25, paras 11–15, pointing to an inequitable nature of unfair conditions. For this, a balancing of all relevant interests is usually required. This approach was applied in the Commission's decisional practice as a two-step assessment: the indispensability test, assessing if the trading conditions are absolutely necessary for effective protection, followed by the equity test, assessing whether the trading conditions limit the copyright holder's freedom more than it need be. Commission Decision 82/204/EEC, IV/29.971-GEMA statutes (1981) OJ L 94, para 36.

⁸⁹ E.g. if they are set in a take-it-or-leave-it manner or in a way that charges for the services are disproportionate to the value of the service provided. See Commission Decision 2001/463/EC, Case COMP D3/34493 – DSD (2001) OJ L 166, para 112.

⁹⁰ In Robertson (n 80) at 14.

⁹¹ In the present case, the fact that the dominant platform needs to establish and maintain its infrastructure that enables content creation in the first place could be one of the arguments for an objective justification.

⁹² Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (2002) OJ L 1, Article 7.

⁹³ See in Case C-372/19 *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Weareone.World BVBA and Wecandance NV* [2020] ECLI:EU:C:2020:959.

⁹⁴ L'Autorité de la concurrence, 'Related rights: the Autorité has granted requests for urgent interim measures presented by press publishers and the news

displays extracts of news stories. Following the national implementation of the new EU rules on copyright and related rights,⁹⁵ Google offered the news publishers to either agree that Google continues to use the now protected materials for free or accept search results display only hyperlinks, without snippets or thumbnails.⁹⁶ The French competition authority found that Google, which is dominant on the market for general search, abused its dominant position. The authority explicitly referred to EU case law on unfair trading conditions;⁹⁷ as the publishers heavily rely on traffic from the search engines, Google's unilateral decision in this case left them with "no other choice than to comply with Google's display policy without financial counterpart" or to face a downgrade of their content display, resulting in a drop in traffic and revenue.⁹⁸ The unfairness stemmed from Google incurring an economic benefit that should, according to the spirit of the new rules, go to publishers; as the legislator provided an option for publishers to be remunerated, the refusal to negotiate payments amounted to an abuse of dominance. Subsequently, the authority required Google to negotiate in good faith about remuneration with the news publishers.⁹⁹

agency AFP (Agence France Presse)' (9 April 2020) <<https://www.autoritedelac concurrence.fr/en/communiqués-de-presse/related-rights-autorité-has-granted-requests-urgent-interim-measures>> accessed 7 June 2024.

⁹⁵ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L 130. Among other things, the directive imposes transparency obligations with regard to 'fair remuneration in exploitation contracts of authors and performers' and grants authors access to data on profits that online platforms derive from exploitation of different content. See also Mazziotti (n 16).

⁹⁶ Maciej Janik, 'The Battle Between Autorité de la Concurrence and Google to Make Press Publisher's Right a Reality in France' (*Maastricht University*, 3 June 2022) <<https://www.maastrichtuniversity.nl/blog/2022/06/battle-between-autorit%C3%A9-de-la-concurrence-and-google-make-press-publisher%E2%80%99s-right>> accessed 7 June 2024.

See also Marco Botta, 'Exploitative Abuses: Recent Trends and Comparative Perspectives' (*SSRN*, 2021) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3909894> accessed 7 June 2024.

⁹⁷ L'Autorité de la concurrence (n 94). Its decision was confirmed by the Court of Appeal of Paris. In Giorgio Monti and Alexandre de Streel, 'Exploitative Abuses: The Scope and the Limits of Article 102 TFEU' (*SSRN*, 2023) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4630871> accessed 7 June 2024.

⁹⁸ L'Autorité de la concurrence (n 94).

⁹⁹ See further in Monti and de Streel (n 97).

3.4 **Synthesis: The Extent of EU Protection Against Potentially Exploitative Digital Labour Practices**

From the legal frameworks just discussed, it is quite evident that the situation surrounding the relationship between the digital platform and content creators, especially regarding remuneration and revenue-sharing, is rather complex. First, concerning their status and the applicability of the rules, while some content creators have made YouTube their career and could thus be considered to perform content creation in their commercial or professional capacity (i.e. as business users), others treat it as a passion project or a hobby, acting purely in an amateur capacity (i.e. as other users or consumers). Consequently, this impacts the applicable protections. Content creators classified as business users are entitled to transparency regarding the terms and conditions and certain decisions made by the platform, e.g., if the services are restricted or suspended, and to a mechanism for challenging such decisions. In their capacity as other users or consumers, content creators would be entitled to information regarding content moderation and ranking, including lodging complaints against content- or account-related decisions under the DSA, as well as to clear and comprehensible information about transactions they make and to the right not to be deceived or coerced into making certain (economic) choices, if considered consumers for the purposes of consumer protection law. Such transparency and accountability obligations for digital platforms are a welcome development in terms of ensuring fairness in a procedural sense and “represent a significant improvement in the position of those who would otherwise be in a vulnerable position”.¹⁰⁰ While reducing informational asymmetry between platforms and their users is positive, however, this arguably “did not prevent these providers from protecting their own business interests, at the expense of their business users.”¹⁰¹ Namely, in light of the present contribution’s focus, the obligations do not include stronger transparency as regards remuneration calculations beyond indications on earnings over time or performance statistics or the possibility of challenging the revenue-sharing policy of YouTube more directly.¹⁰² As observed, then, the analysed instruments seem to advance the

¹⁰⁰ Barnard (n 8).

¹⁰¹ Thomas Tombal, ‘Ensuring contestability and fairness in digital markets through regulation: a comparative analysis of the EU, UK and US approaches’ (2022) 18 European Competition Journal 468, 487, discussing the P2B Regulation specifically.

¹⁰² E.g. while the DSA allows challenging the decisions regarding the restriction of content monetisation, this arguably would not extend to challenging the terms of remuneration themselves.

view that the distributional outcomes are fair if, or rather, because they are produced by voluntary and transparent market transactions of reasonably well-informed participants, effectively obscuring the design “that necessarily involve[s] choosing to benefit some and disempower others”.¹⁰³

A more direct attack on terms of remuneration, to facilitate fairness in a more substantive sense, could emerge from a competition law intervention, which could mandate that the trading conditions, including remuneration, towards content creators do not go beyond what is necessary, are not unilaterally imposed and disproportionate, and are not too vague, uncertain, or broad. This lends itself well to the growing interest in fairness considerations on digital markets.¹⁰⁴ Considering this, the *Google News* case is deemed significant for applying the doctrine on exploitative abuses in the digital context,¹⁰⁵ albeit on the national level, indicating that (EU) competition law could facilitate a fairer distribution of economic value from digital platforms,¹⁰⁶ or at least to grant those that supply them with content a stronger bargaining position. However, as the orthodox enforcement of competition law is arguably still preoccupied with maximising economic welfare and efficiency¹⁰⁷ and, moreover, understands fairness primarily in a procedural sense,¹⁰⁸ the defensibility of such an approach is nonetheless contested.¹⁰⁹ Moreover, there are some practical drawbacks, since competition authorities are usually reluctant to intervene to essentially regulate firms’ business models. Further, a competition law decision would only be applicable to the dominant firm in question and not to the digital economy at large. If the exploitation of digital labour is considered a problematic characteristic of the contemporary digital capitalism, competi-

¹⁰³ See in Griffin (n 60).

¹⁰⁴ See, e.g., European Commission, ‘EVP Vestager Keynote speech at the European Competition day 2022 in Prague, “Fairness and Competition Policy”’ (*European Commission*, 10 October 2022) <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_22_6067> accessed 7 June 2024; Francesco Ducci and Michael Trebilcock, ‘The revival of fairness discourse in competition policy’ (2019) 64 *The Antitrust Bulletin* 79; Niamh Dunne, ‘Fairness and the challenge of making markets work better’ (2020) 84 *The Modern Law Review* 230; Sandra Marco Colino, ‘The antitrust F word: Fairness considerations in competition law’ (2019) *The Chinese University of Hong Kong, Faculty of Law, Research Paper No.* 2018-09.

¹⁰⁵ Botta (n 96).

¹⁰⁶ Janik (n 96). See, generally, Ariel Ezrachi (n 76) at 16.

¹⁰⁷ Ducci and Trebilcock (n 104) at 84, 89.

¹⁰⁸ Kalimo and Majcher (n 80) at 218.

¹⁰⁹ Janik (n 96).

tion law intervention would thus only represent a partial solution, ultimately pointing to the need for further regulation.

4 CONCLUDING THOUGHTS

In this contribution, the relationship between the digital platform and content creators was analysed through the digital labour lens, to illuminate the role of content creators and their labour driving the profitable digital platform economy.¹¹⁰ This relationship is peculiar, as it benefits both parties, yet the exploitation might emerge as one party converts the labour required for content creation into value that is channelled towards the platform's advertising profits; the question emerges whether the acquired revenue is, or could be, shared (more) fairly. Thus, selected EU frameworks were examined to assess what kinds of affordances they offer, but the analysis of the EU acts regulating the digital economy provided mixed answers. Namely, the EU approach seems to favour remedies that tackle informational asymmetries, that is, properly informing content creators about the terms of remuneration, without necessarily challenging the business model itself that could be, through a critical lens, seen as disproportionately benefitting the digital platform and are more in favour of procedural, rather than substantive, solutions. While an *ex post* intervention could be envisioned through EU competition law, such an approach might not be fully in line with the established antitrust orthodoxy that has "long justified distributive asymmetries and concentrations of commercial power".¹¹¹ In this light, the fight for fair compensation might be left in the hands of content creators themselves; unionising activities are already emerging with a goal to show that content "creators can be artists and entrepreneurs, athletes and popularisers, but they are always professionals, capable of producing value through specific skills and tools".¹¹²

¹¹⁰ See, e.g., Parmy Olson, 'Much 'Artificial Intelligence' Is Still People Behind a Screen' (*Bloomberg*, 13 October 2021) <<https://www.bloomberg.com/opinion/articles/2021-10-13/how-good-is-ai-much-artificial-intelligence-is-still-people-behind-a-screen>> accessed 7 June 2024.

¹¹¹ Elettra Bietti, 'Self-Regulating platforms and antitrust justice' (2022) 101 *Texas Law Review* 165.

¹¹² 'In Italy even influencers have their union' (*NSS*, 18 October 2022) <<https://www.nssmag.com/en/fashion/31196/syndicate-influencer>> accessed 7 June 2024; Isobel Blackburn, 'The Creator Union: A Voice for Creators & Influencers' (*The Media Moment*, 16 March 2023) <<https://www.themediamoment.com/analysis/the-creator-union-voice-for-creators-influencers>> accessed 7 June 2024.

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