

# Working Papers Series

#1

*Influencer Agreements: An  
Analysis from the Perspective  
of Romanian Contract Law*

MIRUNA DUTA



# Influencer Agreements:

An Analysis from the Perspective of Romanian Contract Law

Miruna Maria Duță

## I. Introduction

In the past year, the online world has embraced an impressive growth, having more than one million people accessing the internet for the first time every day. Out of 7,6 billion people around the world, 4,3 billion are internet users and, particularly, 3,4 billion of them are active social media users.<sup>1</sup>

The growth of the online media has led to new advertorial practices. In 2005 Youtube was launched and soon it became the largest and most accessed video platform of the entire world. Two years later, it partnered with a program (YPP) and made it possible for regular people who uploaded videos (e.g. vlogs, tutorials) to get remunerated for their videos based on the number of their viewers and subscribers.<sup>2</sup> Companies have taken advantage of the new trend and have started promoting their businesses by means of the influencers' popularity on the internet.<sup>3</sup> This phenomenon is known as influencer marketing and despite the numerous definitions of this term, it has 2 main common characteristics, namely that it entails (1) an influencer who is paid for (2) promoting a product or a service using their big reach and audience.<sup>4</sup> Having rooted credibility in a particular industry, an influencer can persuade his viewers,<sup>5</sup> who are colloquially known as followers, leading to the challenge of consumer protection. In addition, as influencers get monetized both by reason of having a certain number of followers as well as by advertising for brands, the content that they are creating must be creative, personal and easily readable but must also subtly describe a product or service in a convincing as well as concise manner.

Because of the pressure brought by the two factors that determine the monetization of an influencer, the content that is created can end up being unlawful. Illicit practices include false advertisement,<sup>6</sup> non-disclosed endorsements<sup>7</sup> which result in misled consumers, as well

---

<sup>1</sup> Simon Kemp, 'Digital 2019: Global internet use accelerates' [2019] We are social <<https://wearesocial.com/blog/2019/01/digital-2019-global-internet-use-accelerates>> accessed 15<sup>th</sup> July 2019; Internet world Stats, 'Internet usage statistics' [2019] Internet World Stats <<https://www.internetworldstats.com/stats.htm>> accessed 15<sup>th</sup> July 2019.

<sup>2</sup> Florencia García-Rapp, 'The digital media phenomenon of YouTube beauty gurus: the case of Bubzbeauty' [2016] 12 Int. J. Web-Based Communities 360–375.

<sup>3</sup> Shannon Byrne, 'The Age of the Human Billboard: Endorsement Disclosures in New Millennia Media Marketing' [2015] 10 J. Bus. & Tech. L, 393.

<sup>4</sup> Christina Sauerborn, 'Making the FTC : An Approach to Material Connections Disclosures in the Emoji Age' [2018] 28 FORDHAM INTELL PROP MEDIA & ENT LJ, 574.

<sup>5</sup> Adrienne Sconyers, 'Corporations, Social Media, & Advertising: Deceptive, Profitable, or Just Smart Marketing' [2018] 43 J CORP L 417.

<sup>6</sup> Ava Farshidi, 'Evaluating the FTC Endorsement Guidelines Through the Career of a Fashion Blogger', *Journal of Sports & Entertainment Law*, 187.

<sup>7</sup> Grant Gross, 'Paid, non-disclosed Xbox One endorsements land Machinima in hot water with FTC' [2015] PCWorld <<https://www.pcworld.com/article/2979701/paid-endorsements-get-xbox-one-marketer-in-trouble-with-ftc.html>> accessed 15<sup>th</sup> July 2019.

as the promotion of racist, anti-Semitic content,<sup>8</sup> false dietary advice,<sup>9</sup> and even the promotion of products that contain addictive chemicals.<sup>10</sup>

A systematic literature review<sup>11</sup> has been done in order to reveal the main aspects, problematic or not, relating to influencer marketing. These are provided in the following section and they reflect the research that has already been done and the research that is still needed in this area.

## A. Literature Review

In order to fully grasp the concept of influencer marketing, research has been conducted into several sub-concepts of this term.

Although the term influencer is commonly used, especially in online media, research shows that there are various possibilities to describe one. A few years ago, it has been proposed that influencers can be classified as a type of celebrity, a microcelebrity who, by reason of narrating their personal life on a blog or a social media platform such as Instagram or Facebook are being paid. In their posts, they include products or services which they are actually advertising on.<sup>12</sup> However, more recent publications show that the definition has become more detailed. Anyone “who has the power to affect purchase decisions of others because of their (real or perceived) authority, knowledge, position, or relationship” can be an influencer.<sup>13</sup> In addition, this is also substantiated by case law. According to the International Trademark Association an influencer is defined as a social media user who became credible in a certain industry, has a large audience and bears the power of influencing other social media users with regard to purchases, because of their position, knowledge, authority or relationship.<sup>14</sup>

---

<sup>8</sup>Andy Campbell, ‘PewDiePie’s excuse for promoting racist YouTube content includes more racist content’ [2018] Huffington Post <[https://www.huffpost.com/entry/pewdiepies-excuse-for-promoting-racist-youtube-content-includes-more-racist-content\\_n\\_5c1027e4e4b00e17a533cb0d](https://www.huffpost.com/entry/pewdiepies-excuse-for-promoting-racist-youtube-content-includes-more-racist-content_n_5c1027e4e4b00e17a533cb0d)> accessed 15<sup>th</sup> July 2019.

<sup>9</sup> Lauren Sharkey, ‘Influencers are giving inaccurate dietary advice at alarming levels, according to this study’ [2019] Bustle <<https://www.bustle.com/p/influencers-are-giving-inaccurate-dietary-advice-at-alarming-levels-according-to-this-study-17283387>> accessed 15<sup>th</sup> July 2019.

<sup>10</sup> Federal Trade Commission, ‘FTC and FDA Send Warning Letters to Companies Selling Flavored E-liquids About Social Media Endorsements without Health Warnings’ [2019] Federal trade commission <<https://www.ftc.gov/news-events/press-releases/2019/06/ftc-fda-send-warning-letters-companies-selling-flavored-e-liquids>> accessed 15<sup>th</sup> July 2019.

<sup>11</sup> Marnix Snel, Janaina de Moraes, *Doing a systematic literature review in legal scholarship* (Eleven International Publishing, 2018).

<sup>12</sup> Cystal Abidin, ‘Visibility labour: Engaging with Influencers’ fashion brands and #OOTD advertorial campaigns on Instagram’ [2016] 161 *Media International Australia*, 86.

<sup>13</sup> Laura E. Bladow, ‘Worth the Click: Why Greater FTC Enforcement Is Needed to Curtail Deceptive Practices in Influencer Marketing’ (2018) 59 *WM & MARY L REV* 1123.

<sup>14</sup> Margret Knitter, ‘Recent Case Law Clarifies Influencer Marketing and Labeling Requirements in Germany’, [2019] *INTA Bulletin*

Additionally, relating directly to influencers, research has been conducted into self-branding and attention-seeking online practices with the focus on those in connection with Twitter.<sup>15</sup>

With regard to social media influence, the existing literature focuses on a variety of practices that popped out together with the intrinsic rise of the online media. The major companies, such as Facebook and Google, seized the online advertising environment by developing a business model called "pay-as-you-go" with which advertisers are paid when a web page is viewed or accessed. This led to the practice of spreading fake news, manipulating public opinion and political behaviour, practice which became a very important issue. Spreading fake news is not only done intentionally, and it induces consumers in error, but it also affects the functioning of democratic society and the vision of ordinary people on reality. These considerations are greatly accentuated in literature as is trying to find solutions to avoid these practices.<sup>16</sup> Another practice, now popular, began fourteen years ago when former Governor of Vermont, Howard Dean, started using the internet for presidential elections. Thus, a new way to promote political campaigns developed. Evidence that this way of promotion was and still is fruitful and that the public can be easily influenced, is even President Obama who, through social media, won the presidential elections. Since then, many politicians adopted this technique, and the dangers resulting from it consist both in the generated content that often conceals contradictions and in their rapid nature of spreading.<sup>17</sup>

Another focus is on non-disclosed endorsements, more specifically on the FTC Guidelines which require the concrete disclosure of advertisements and most papers are evaluating these guidelines and are explaining that the regulation of advertising practices is challenging.<sup>18</sup> However, this part of the literature is mostly doctrinal and targets the US.<sup>19</sup>

---

<[https://www.inta.org/INTABulletin/Pages/Influencers\\_and\\_Labelling\\_in\\_Germany\\_7401.aspx](https://www.inta.org/INTABulletin/Pages/Influencers_and_Labelling_in_Germany_7401.aspx)> accessed 15<sup>th</sup> July 2019.

<sup>15</sup> Florencia García-Rapp, 'The digital media phenomenon of YouTube beauty gurus: the case of Bubzbeauty' [2016] 12 Int. J. Web-Based Communities 360.

<sup>16</sup> Alberto Allemano, 'How to Counter Fake News? A Taxonomy of Anti-fake News Approaches' [2018] 9 European Journal of Risk Regulation 1.

<sup>17</sup> Gabriel M. A. Elorreaga, 'Don't Delete That Tweet: Federal and Presidential Records in the Age of Social Media' [2019] 50 ST MARY'S LJ 483, 498-509.

<sup>18</sup> Ava Farshidi, 'Evaluating the FTC Endorsement Guidelines Through the Career of a Fashion Blogger' [2018] 9 *Journal of Sports & Entertainment Law* 185;

Alissa Del Riego, 'Digest Comment-Context for the Net: A Defense of the FTC's New Blogging Guidelines' [2009] Jolt Digest <<https://jolt.law.harvard.edu/digest/digest-comment-context-for-the-net-a-defense-of-the-ftc-e2-80-99s-new-blogging-guidelines>> accessed 15 July 2019;

Laura E Bladow, 'Worth the Click: Why Greater FTC Enforcement Is Needed to Curtail Deceptive Practices in Influencer Marketing' [2018] 59 William & Mary Law Review 1123-[viii];

Shannon Byrne, 'The Age of the Human Billboard: Endorsement Disclosures in New Millennium Media Marketing' [2015] 10 J. Bus. & Tech. L. 393.

<sup>19</sup> Catalina Goanta, 'How Technology Disrupts Private Law: An Exploratory Study of California and Switzerland as Innovative Jurisdictions' [2018] 38 TTLF Working;

(Non-)disclosures represent a challenge in other disciplines as well. For example, research on affiliate marketing disclosure has been done in the context of a multidisciplinary field of study, human-computer interaction.<sup>20</sup> Non-disclosures are also triggered in the realm of marketing.<sup>21</sup> Moreover, studies address advertisements through the word-of-mouth and in the context of social influence.<sup>22</sup>

In Romanian literature specifically, academic papers exist on the regulation of the digital media with regard to taxes,<sup>23</sup> intellectual property rights,<sup>24</sup> as well as political speech or campaigns on social media<sup>25</sup> or fake advertisement.<sup>26</sup>

The available literature shows that empirical research into the practices of influencers is lacking and that, in Europe, it is unclear what regulates this market. A possibility is to bring deceptive practices of influencers under the Unfair Commercial Practices Directive,<sup>27</sup> however, its provisions are only applicable to the attitude of the trader towards the consumer and this is problematic sometimes.<sup>28</sup> In a situation when a blogger reviews products out of personal, non-commercial reasons, for example, even though the reviews are advertisements per se, the Directive is not applicable, because his acts must be connected to his trade, business, craft or profession.<sup>29</sup> Even though there is no targeted set of rules, very few European countries try to

---

F. Henning-Bodewig, 'Influencer-Marketing – der „Wilde Westen des Werbens“?' [2017] 12 Wettbewerb in Recht und Praxis, 1415-1421.

<sup>20</sup> Arunesh Mathur, Arvind Narayanan, 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.

<sup>21</sup> Marijke De Veirman, Veroline Cauberghe, Liselot Hudders, 'Marketing through Instagram influencers: the impact of number of followers and product divergence on brand attitude' [2017] 36 International Journal of Advertising, 798-828.

<sup>22</sup> V. Blazevic, W. Hammedi, I Garnefeld, RT Rust, 'Beyond Traditional Word-of-Mouth: An Expanded Model of Customer Influence' [2013] 24 Journal of Service Management, 294-313.

<sup>23</sup> Bogdan Stoicescu, 'ACTIUNEA 1[1]-Rezolvarea Provocarilor Fiscale aduse de Economia Digitala' [2018] 2 Revista societăților și a dreptului comercial.

<sup>24</sup> Liviu Marius Harosa, '*Bunurile incorporale si proprietatea virtuala*' [2017] 3 Universul juridic.

<sup>25</sup> Elena Madalina Nica, 'Utilizarea internetului si a social media' [2017] 3 Universul Juridic.

<sup>26</sup> Redactia, 'Cum recunoaștem escrocheriile privind locurile de muncă și angajarea?' [2017] 2 Legestart.

<sup>27</sup> 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 and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive').

<sup>28</sup> Art. 3 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 and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive').

<sup>29</sup> Sophie C Boerman, Natali Helberger, Guda van Noort & Chris J Hoofnagle, 'Sponsored Blog Content: What Do the Regulations Say: And What Do Bloggers Say' [2018] 9 J INTELL PROP INFO TECH & ELEC COM L 146;

Art. 2 (b) 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 and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and

shed some light on how to regulate this market. The UK Competition and Markets Authority issued guidance with regard to social media campaigns, more specifically, on how to change the way of posting online content relating to brands or campaigns.<sup>30</sup> Moreover, the Austrian authorities have issued a set of rules aiming at clarifying this industry as well.<sup>31</sup>

## B. Research Question

Reviewing the existing literature on the topic, it can be observed that the idea of looking at influencer marketing from a private law perspective has not emerged yet. As influencer marketing is based on transactions and influencers conclude influencer agreements with other parties, a mechanism to look into their practices is contract law. Therefore, the present paper proposes the following research question: What are the contractual practices between an influencer and a brand and how can these influencer agreements be classified according to Romanian contract law?

## C. Methodology

Influencer marketing is a topic that is of interest in many disciplines, as previously shown, social sciences, formal sciences as well as applied sciences being the main ones. As the main purpose of this paper is to explore the legal nature of influencer agreements in practice, the most appropriate research methodology, which looks at the societal context from a legal point of view, is the socio-legal research methodology. The latter has been chosen because the approach in this respect needs to overcome the internal perspective, which is usually used in black letter analysis.<sup>32</sup> There is need to look at the society we live in, at the modern world of internet that surrounds us, in relationship with law from a theoretical perspective which is created with the help of sociology, economics or political science.<sup>33</sup> In addition, the choice for this type of methodology is further substantiated by the fact that “empirically, law is a component part of the wider social and political structure, is inextricably related to it in an

---

Regulation (EC) No 2006/2004 of the European Parliament and of the Council (‘Unfair Commercial Practices Directive’).

<sup>30</sup> Competition and Market Authority, ‘An Influencer’s Guide to making clear that ads are ads’ [2018] Competition and Market Authority <<https://www.asa.org.uk/news/new-guidance-launched-for-social-influencers.html>> accessed 15 July 2019.

<sup>31</sup> Werberat, ‘Ethik-kodex der werbewirtschaft’ [2019] Werberat <[https://werberat.at/layout/ETHIK\\_KODEX\\_2\\_2019.pdf](https://werberat.at/layout/ETHIK_KODEX_2_2019.pdf)> accessed 15<sup>th</sup> July 2019.

<sup>32</sup> Caroline Morris, Cian Murphy, *Legal Research Methodologies, Getting a PhD in Law*, (Hart Publishing 2011), 34-35.

<sup>33</sup> Darren Donovan, *Socio-Legal Methodology: Conceptual Underpinnings, Justifications and Practical Pitfalls*, (Cahillane & Schweppe 2016).

infinite variety of ways, and can therefore only be properly understood if studied in that context”, as one author nicely explains.<sup>34</sup>

However, in order to provide a comprehensive viewpoint on the contractual practices between an influencer and a brand, the empirical legal research method has been chosen as a complement to the socio-legal research methodology. The form of analysis applied to the empirical research method is qualitative and is reflected in the last part of the paper, where the findings are presented.

First, however, I am explaining how I proceeded. To clarify, my target was to gain as much insight as possible into the contractual practices that happen in influencer marketing in Romania and therefore, I addressed influencers and influencer agencies. I searched on the internet for Romanian influencer agencies and eventually I found a website that provided a comprehensive list of 19 influencer agencies.<sup>35</sup> I did not doubt the reliability of this website because of two reasons. On the one hand, because these influencer agencies really exist (as I contacted them and I also already knew about some of them) and on the other hand, because I have seen on the website that there are several articles which extensively touch upon the topic of influencer marketing. In addition, the articles of that website are written by a, currently, trainer and social media consultant. After getting the list, I started visiting all the influencer agencies’ websites and I found the email addresses of each of them, except of one. I created the list of influencers the same way I found the contact details of the influencer agencies, by checking their websites. Thus, I created a list of 18 influencer agencies and a list of 20 influencers (which represent the ones whose personal email address I found).

To this end, I created 2 types of questionnaires, one addressed to influencer agencies and another one addressed to influencers themselves, which had 19 and 16 questions respectively. With regard to the questions, it is important to mention that most of them embodied the “short text” format and the rest the “multiple choice” format. I sent emails to the mentioned parties through which I explained what and why I am researching. In addition, I asked for model contracts that they use when concluding influencer agreements and I provided them a link to the questionnaire.

I deployed the questionnaire to the influencer agencies on 25 May and 27 May and to the influencers on 5 June, the ending time of this deployment being the end of June. During that period, I sent a reminder on 3 June to the influencer agencies in order to improve the

---

<sup>34</sup> P. Thomas, ‘Curriculum Development in Legal Studies’ (1986) 20 Law Teacher, 112.

<sup>35</sup> Cristian Manafu, ‘19 agenții de influencer marketing din România’ [2018] Manafu <<https://www.manafu.ro/2018/08/agentii-de-influencer-marketing-din-romania/>> accessed 15 July 2019.

response rate. In this manner, 5 influencer agencies and 4 influencers filled in the questionnaires. Besides that, I received 2 model contracts of influencer agreements. Therefore, the findings that are discussed in the last section of the paper are based on the previously mentioned response rate.

However, for the analysis of the gathered contracts, I chose the doctrinal method of analysis,<sup>36</sup> as the law needs to be studied as well for a proper understanding of the contractual practices. Eventually, by using this methodology, the laws applicable to the contractual monetization supply chain will become more coherent and consistent. Thus, the uncertainty in this sphere would decrease and the regulation of it would become more accessible.

In order to answer the research questions, the paper adopts the following structure. First, the monetization supply chain is described and therefore, the identified parties which take part in it are presented. Second, the nature of agreements is analysed and the agreements are classified according to Romanian law. Moreover, the legal obligations arising out of the classifications which the parties ought to fulfil are pointed out. The third part discusses the findings arising from the conducted empirical research. Finally, a conclusion is provided.

## II. The Nature of Influencer Agreements

### A. Monetization Supply Chain

In the new era we live in, the era of digitalization, for everything we want to do, there is the possibility to do it electronically, from basic stuff such as sending a message via phone, searching for information online to developing new machines or businesses. As everybody is connected to the internet and people spend a significant amount of time on social media platforms, such as Instagram, Twitter or Facebook, it is no wonder that businesses started taking advantage of it. Thus, brands have moved from the traditional way of advertising via TV or radio to a more up-to-date way of advertising, namely via social media.

According to academics, Boyd and Ellison, the definition of social media includes three characteristics thereof, namely that it is a “web-based service that allows individuals to i) construct a (semi-)public profile within a bounded system, ii) articulate a list of other users within whom they share a connection and iii) view and traverse their list of connections and those made by others within the system”. The proposed definition indicates that social media

---

<sup>36</sup> Caroline Morris, Cian Murphy, *Legal Research Methodologies, Getting a PhD in Law*, (Hart Publishing 2011), 30-31.

is a term used to describe both social software and social networking.<sup>37</sup> This encompasses many features that help individuals expose themselves publicly, discover other people, communicate with them and connect with each other. By using social media, in any way, either by being very active and posting stuff and engaging in conversations or by being merely a (shadow) observer, trust between users can be easily created, because people share ideas, their different views on certain subjects, all sorts of information, content and perspectives. Regular peers started taking pictures, making videos of themselves and shared them on social media, and soon they got not only the attention of a vast audience, but they also gained the followers' trust. As some ways of advertisement such as via Google AdSense<sup>38</sup> started to need to be changed because of their unpleasant nature and because of this fairly easy way of creating trust, influencer marketing has emerged. An influencer is a regular peer who, because he has a big number of followers, is deemed to be popular<sup>39</sup> and influencer marketing represents the way of advertising on social media by means of an influencer.<sup>40</sup>

There are three types of influencers that can be identified based on the number of followers. Nano-influencers are usually those who have thousands of followers, usually less than 10 000, whereas micro-influencers have tens of thousands of followers.<sup>41</sup> The influencers that have the most viewers are known as mega influencers have from a hundred thousand to millions of followers.<sup>42</sup>

As my findings also show, there are influencers who work independently and other who work with an influencer agency when collaborating with a brand. According to a recent publication<sup>43</sup> there are *three main models* to be recognized that show the use of intermediation which is characteristic to the transactions happening in the supply chain. First, there is the *bilateral use of intermediation*, according to which the brands as well as the influencers are put in contact with each other with the help of advertising or PR agencies and talent or influencer

---

<sup>37</sup> Jawahitha Sarabdeen, 'Legal Risks in Social Media Marketing' [2014] 4 International Journal of e-Education, e-Business, e-Management and e-Learning, 219.

<sup>38</sup> Google, 'How AdSense works' Google Support

<<https://support.google.com/adsense/answer/6242051?hl=en>> accessed 15<sup>th</sup> July 2019.

<sup>39</sup> Catalina Goanta, isabelle Wildhaber, *The Regulation of Social Media Influencers* (Edward Elgar Publishing, 2019) (forthcoming).

<sup>40</sup> European Commission, 'Behavioural study on advertising and marketing practices in online social media' COM (2018) 85 01 final.

<sup>41</sup> Vujenny, 'Mega-, macro-, micro- and nano-influencers — What's the difference, and which should you use for your brand?' [2018] Medium <<https://medium.com/@vujenny/mega-macro-micro-and-nano-influencers-whats-the-difference-and-which-should-you-use-for-9839bb3055ae>> accessed 15<sup>th</sup> July 2019.

<sup>42</sup> Humay, 'What are nano, micro, macro and mega influencers and why you should care' [2018] Inflowlabs <<https://inflowlabs.com/2018/01/09/nano-micro-macro-mega-influencers-care/>> accessed 15<sup>th</sup> July 2019.

<sup>43</sup> Catalina Goanta, isabelle Wildhaber, *The Regulation of Social Media Influencers* (Edward Elgar Publishing, 2019) (forthcoming).

agencies respectively. The second model is the *unilateral use of intermediation* by means of which either the influencer or the brand are represented by the respective agencies. Third, the influencers and the brands are not making use of intermediation but are rather in *direct contact*.<sup>44</sup> The contracts concluded for the purpose of influencer marketing, no matter which of the above-mentioned form they take, are called influencer agreements.<sup>45</sup>

As influencers get monetized by advertising products, there are four business models recognizable to this end:<sup>46</sup> (i) *Affiliate marketing*<sup>47</sup> stands for the use of a discount code as a way of promotion. The influencer makes a discount code available to their public when promoting a product or a service. With the use of the code, the brand keeps track of the transactions made by using the discount code and the influencer gets paid a certain commission (e.g. 15%) which is associated with the value of each transaction concluded this way. Another way of marketing is through (ii) *paid endorsements*, whereby the influencer, in agreement with the brand, must advertise the product in a certain way. Examples encompass the following: the influencer must include specific products or decoration in the photos; or they have to post in a given time-range; or they must post a certain number of pictures. In addition, an influencer can become a brand ambassador<sup>48</sup> which also falls under this category. A brand ambassador is hired by a brand to represent it and promote it by advocating positive characteristics of the brand and by being the spokesperson.<sup>49</sup> The third business model is (iii) *barter*. With this type of model, the influencer receives products from the brand (e.g. beauty products, shoes, clothes as well as vacations, or dinners at certain restaurants) whereas he must post on social media platforms and express positive characteristics of the product or service. It is important to mention that this type of business model cannot be qualified as an exchange contract because such contract can only be in exchange of objects and not services. The last type of agreement is recognized

---

<sup>44</sup> Linqia, 'The State of Influencer Marketing' [2018] Linqia < <https://www.linqia.com/wp-content/uploads/2017/12/Linqia-The-State-of-Influencer-Marketing-2018.pdf> >;

K. Gallagher, 'The Influencer Marketing Report: Research, strategy & platforms for leveraging social media influencers' [2018] Business Insider < <https://www.businessinsider.com/the-influencer-marketing-report-2018-1> > accessed 15th July 2019.

<sup>45</sup> Izea, 'How to create a social media influencer agreement' [2019] Izea <<https://izea.com/2019/01/08/create-social-media-influencer-agreement/>> accessed 15th July 2019.

<sup>46</sup> Catalina Goanta, Isabelle Wildhaber, *The Regulation of Social Media Influencers* (Edward Elgar Publishing, 2019) (forthcoming).

<sup>47</sup> A. Mathur, A. Narayanan, M. 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, 119:3-119:4.

<sup>48</sup> Nerisha Penrose, 'Chiara Ferragni is pomellato jewellery's newest brand ambassador' [2018] Elle <<https://www.elle.com/fashion/a16570466/chiara-ferragni-is-pomellato-jewelryst-newest-brand-ambassador/>> accessed 15th July 2019.

<sup>49</sup> Brand ambassadors 'Brand ambassadors-Influencer marketing-Brand ambassador programs'[2019] Brand ambassadors < <https://www.brandambassadors.nl/en/> > accessed 15 July 2019.

as (iv) *direct selling*, where the influencers are incorporating a company which they use for creating certain products (e.g. self-created goods or branded merchandise)<sup>50</sup> or services (e.g. access to platforms where users can exchange videogame gun skins) and sell them to their public.

As influencer agreements are nowadays mostly concluded formally, i.e. they are written, legally binding agreements, it is important to identify what types of contracts they are in practice. A qualification of influencer agreements according to Romanian contract law is provided in the next section.

### B. Possible Qualifications of Influencer Agreements according to Romanian Law

At the moment, the practices of social media influencers are regulated via various means that are not targeted at this sphere as such. Yet, the digital content that influencers generate must be in conformity with all the laws that are currently in force in this realm. These include: The Code of Practice in Commercial Communication, known as the RAC Code,<sup>51</sup> drafted by the Romanian Council for Advertisement. In addition, Law no. 363/2007 on combating the incorrect traders' practices in relation to consumers and their protection, which is the transposition of the Unfair Commercial Practices Directive, must be followed. Last, and most important, is to be in conformity with the Romanian Civil Code.

In the area of influencer marketing, research in the Romanian literature is scarce, especially with regard to the contractual supply chain in influencer agreements. As previously mentioned, empirical research has been conducted into the common contractual practices between an influencer or influencer agency and a brand or its PR agency. Therefrom, it is visible that the influencer agreements are not specific types of contracts, but merely contracts adapted to this type of contractual monetization, according to the parties' needs.

One of the main principles which stands at the root of contract law is indeed the principle of contractual freedom. This principle is found in Article 1169 New Civil Code and entails that the parties bear the freedom of concluding any types of contracts and to determine their content, in line with the limits imposed by law, public order and good morals.<sup>52</sup> More specifically, the parties are allowed to conclude nominate as well as innominate contracts and to introduce all sorts of clauses, even clauses that are not explicitly regulated by law, in the

---

<sup>50</sup> Kite, 'The Rise of Influencer Merchandising' [2018] < <https://www.kite.ly/blog/rise-influencer-merchandising/> > accessed 15 July 2019.

<sup>51</sup> Consiliul roman pentru publicitate, *Codul de practica in comunicarea comerciala* [2018].

<sup>52</sup> Art. 1169 Romanian Civil Code.

agreements concluded in that particular case. Nonetheless, the principle of contractual freedom presupposes some limits, the parties are not so free to (not) enter into a contract, because of the existence of not negotiated contracts.<sup>53</sup> As previously pointed out, there are two types of contracts, nominate and innominate. The existence of this differentiation depends on whether contracts are explicitly regulated by law or not and this can be deduced from the provisions encompassed by the New Civil Code, from Article 1167 to Article 1168 which define the common law applicable to innominate contracts. On the one hand, nominate contracts are those contracts which are expressly governed by the Civil Code or other rules and are named according to the juridical operation that they embody (e.g. they are embodying a sale, a provision of services or a rent etc.). On the other hand, innominate contracts represent the contracts that are not expressly regulated by law and lack a legal title. They exist due to the principle of contractual freedom and they are governed by the general conditions for validity of contracts enshrined in the New Civil Code.

From the perspective of the juridical regime of each category, this classification of contracts is very important in practice. Looking at Article 1167 and Article 1168 New Civil Code, 3 rules are apparent. (i) All contracts are governed by common law with respect to the validity conditions and the effects of contracts. (ii) The nominate contracts, however, are governed first by special rules (i.e. special rules applicable to particular types of contracts) and then by common law. The latter are applicable in cases where there are no special rules applicable to the problem in question. (iii) Last, innominate contracts are first governed by common rules and then by the special rules for the contracts that the innominate contract resembles the most with.<sup>54</sup>

Transposing this to influencer agreements it follows that they constitute the object of the New Civil Code, as Article 2 (1) New Civil Code states that the Code is applicable to the patrimonial and non-patrimonial relations between persons. Influencers conclude contracts for the purpose of monetization but also for the purpose of assuring that their creations (e.g. the artistic pictures or videos, the blog texts) are protected by law from other internet users who could use their content for their own purposes. Moreover, the common rules are all those rules that are encompassed by the Code. The essential conditions for the validity of a contract are (1) the contracting capacity, (2) the consent of the parties, (3) a determined and licit object and (4) a licit and moral cause. With regard to the latter, it must be specified that it is easy for an

---

<sup>53</sup> Flavius-Antoniou Baias, Eugen Chelaru & others, *Noul cod civil comentariu pe articole* [2017], 1249.

<sup>54</sup> L. Pop. I. Popa, S. I. Vidu, *Curs de drept civil, obligatiile*, (Universul juridic 2015) 45.

influencer to negligently or purposefully disobey it. As previously mentioned in this paper, it has been seen that influencers promote illicit content<sup>55</sup> and this renders the influencer agreement void.

In order to provide a legal qualification of influencer agreements, the content of the contract and the relation between the parties must be analysed. Whether the influencers or brands are intermediated, by influencer agencies or PR agencies respectively, doesn't play a role. The types of contracts which the influencer agreements can be, are presented in the following section.

### Contractor Agreement

An influencer agreement qualifies first and foremost as a contractor agreement according to Article 1851 New Civil Code. This type of contract entails that the entrepreneur will execute a work, either material or intellectual, or will conduct a service, in exchange for a price. The main characteristic of this performance is the involvement of the beneficiary, who, since the beginning, can impose certain specifications, details which the future good will have. However, how much the beneficiary will get involved varies. In general, the entrepreneur independently executes the contract based on his own knowledge. Nevertheless, it is possible for the beneficiary to instruct the entrepreneur.<sup>56</sup> It is important to know that the entrepreneur bears the risk of successfully completing the promised work.<sup>57</sup>

A contractor agreement is a bilateral contract, when there are only 2 contracting parties, which means that both parties have rights and obligations that, moreover, are interdependent.<sup>58</sup> One of the main obligations is the obligation of the entrepreneur to inform the beneficiary whether the execution of the work or its use would be undermined because of the given instructions or the existence or appearance of circumstances which the contractor is not held responsible for. Such obligation exists as communication between the contracting parties is essential. If the good needs to be executed in a very technical or complex way, the beneficiary must be more involved in order to ensure that the good or service produced is qualitative. Therefore, the beneficiary must provide the entrepreneur with information with regard to the

---

<sup>55</sup> Andy Campbell, 'PewDiePie's excuse for promoting racist YouTube content includes more racist content' [2018] Huffington Post <[https://www.huffpost.com/entry/pewdiepies-excuse-for-promoting-racist-youtube-content-includes-more-racist-content\\_n\\_5c1027e4e4b00e17a533cb0d](https://www.huffpost.com/entry/pewdiepies-excuse-for-promoting-racist-youtube-content-includes-more-racist-content_n_5c1027e4e4b00e17a533cb0d)> accessed 15<sup>th</sup> July 2019.

<sup>56</sup> Sergiu Caileanu, 'Hidden Vices in the Contractor Agreement' [2018] 124 REV SOCIETATILOR SI A DREPTULUI COMERCIAL, 127.

<sup>57</sup> Flavius-Antoniou Baias, Eugen Chelaru & others, *Noul cod civil comentariu pe articole*, 1871.

<sup>58</sup> Gabriel Tita-Nicolescu, 'Classification of Contracts under the New Civil Code' [2018] 7 REV UNIVERSUL JURIDIC, 8.

structure of the good, the shape, the purpose of the use of the good, the medium in which it will be used etc.<sup>59</sup> In addition, when the beneficiary is a professional he must be able to offer advice throughout the process of production.<sup>60</sup>

Moreover, it has a commutative character, which means that at the moment of conclusion of contract, both parties acknowledge the existence and the limits of the rights and obligations. Another characteristic is the fact that it entails a successive execution, meaning that the entrepreneur has a period of time during which he has to do the work.<sup>61</sup> What differentiates it from the contract for work is the fact that the entrepreneur enjoys independence as to the execution of the contract, whereas in a contract for work, the employee is subordinated to the employer. Last, the price that has to be paid for the service can consist of a sum of money, other goods or the provision of services (Article 1854 New Civil Code).

An influencer, the entrepreneur in this case, creates photos, videos or writes on blogs in exchange of remuneration from the brand, which is the beneficiary in this case, because it is considered that the deliverables created by the influencer constitute intellectual work or services. Therefore, an influencer agreement is a contractor agreement. Accordingly, the brand's involvement in the execution of the contract is a very important aspect. It must be involved since the beginning, meaning that it must give the influencer certain specification and details about the end product that it wants. Such specifications can include instructions regarding the contents of an image or of a video, or the way in which the influencer must talk about the advertised product, what features of the products she must mention. The involvement of the beneficiary is of such importance because the influencer owes the beneficiary not just the completion of the work, but it must also be successful.

Moreover, as the contractor agreement is a bilateral contract, the obligations of the influencer and the brand are interdependent. Furthermore, the brand is a professional party and the obligation to give certain advice regarding the desired final work must be even more strictly respected. Another important aspect which shows that an influencer agreement is a contractor agreement is that the influencer has a specific time frame as regards the advertisement. This is visible in practice, because when a new brand or not even, just a trending product appears, all influencers of that niche promote the same product in the same time frame. In addition, influencers enjoy independence as to the way of marketing (i.e. they must include their personal

---

<sup>59</sup> Sergiu Caileanu, 'Hidden Vices in the Contractor Agreement' [2018] 124 REV SOCIETATILOR SI A DREPTULUI COMERCIAL, 135.

<sup>60</sup> Ibid 137.

<sup>61</sup> Flavius-Antoniui Baias, Eugen Chelaru & others, *Noul cod civil comentariu pe articole*, 1872.

input as well) and this is what differentiates it from a contract for work, where the employee is the subordinate of the employer.

Last, with regard to the payment, influencers indeed receive in exchange for the advertisement, money or goods such as beauty products for testing. In an affiliate marketing and paid endorsement type of advertisement, the most important contractual obligation is the payment of the influencer in exchange for her work.

### Mandate Contract

An influencer agreement can also take the form of a mandate contract which is regulated in Article 2009 New Civil Code. The attorney-in-fact, one of the parties, is concluding one or more juridical acts on behalf of the principal, the other party. This represents the object of the contract and shows that material acts have only an accessory character.<sup>62</sup> When the influencer concludes contracts with a brand, he is carrying out professional activities (e.g. advertising for the brand) and when the attorney-in-fact acts on his behalf in this situation, the mandate contract becomes a mandate for consideration. In this case, the attorney-in-fact's remuneration is calculated based on the general practice in this sphere, unless otherwise agreed in the contract. Because the attorney-in-fact has the right to be remunerated, it is his duty to solve the issue of payment.<sup>63</sup>

The obligations of the attorney-in-fact consist of the execution of the mandate (Article 2017 New Civil Code), to exercise due diligence in the execution of the mandate (Article 2018 New Civil Code) and to be answerable for the exercise of the juridical acts (Article 2019 New Civil Code). This type of contract is used when the influencer or the other party make use of intermediation; it can be either when there is a bilateral use of intermediation or when there is only unilateral use of intermediation.

### Exchange Contract

When the influencer uses barter as a business model, it looks similar to a nominate type of contract, the exchange contract. Article 1763 New Civil Code provides that in an exchange contract, all parties commit to transmit a good in order to acquire another one. Moreover, an exchange contract is bilateral and consensual.<sup>64</sup> As the obligation of the parties is to transmit goods in exchange of goods, influencer agreements cannot qualify as an exchange contract

---

<sup>62</sup> Francisc Deak, Lucian Mihai & Romeo Popescu, *Tratat de drept civil* (Universul Juridic 2017, Vol 2) 6.

<sup>63</sup> Francisc Deak, Lucian Mihai & Romeo Popescu, *Tratat de drept civil* (Universul Juridic 2017, Vol 1) 1.

<sup>64</sup> *Ibid* 255.

because the influencer is not only transferring a good to the brand but is also providing services, he is advertising.

#### Assignment of Copyright Agreement

As an influencer is a person who attracts his audience by posting videos, photos or even plain text, it can be said that they are content creators who bear the right to copyright protection. The right to copyright protection is triggered when a literary or artistic work, which is an intangible intellectual creation, is involved. Such work is defined as “every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression”.<sup>65</sup> Concrete examples of such works include photographic works, cinematographic works as well writings and the list is, nonetheless, non-exhaustive.<sup>66</sup> In Romanian law, the right to copyright protection is guaranteed by and subject to Law 8/1996 relating to copyright and similar rights.<sup>67</sup> When an influencer engages in an advertising campaign, he is required to create something (mostly) using her imagination. However, this work becomes his patrimony, which means that only he can enjoy it. Brands, nonetheless, want to make use of the influencers’ work as well. They might want to post it on the brands’ web page or social media account, for example. According to Article 12 Law 8/1996, every author of a creation has the exclusive right to decide if, in what way and when his creation will be used or exploited, including to consent to the use of his work by third parties. In order to avoid disobeying the law, influencer agreements must also be assignment of copyright agreement. Article 39 Law 8/1996 prescribes that every author can choose to assign his author rights by means of a contract to other persons. In an assignment of copyright agreement, the author gives away his copyright right in exchange for remuneration. Any assignment of copyright agreement must contain provisions regarding the patrimonial rights transmitted and, for each of them, show how they are used, the duration and extent of the cession, as well as the remuneration of the copyright holder. The absence of any of these provisions entitles the interested party to request the termination of the assignment contract.<sup>68</sup> Therefore, an influencer agreement must contain clauses indicating how the influencer generated content is going to be used (e.g. is it going to be posted on the brands’ page, is it going to be transmitted to other parties or others), for how long the cession of the

---

<sup>65</sup> Art. 7 Romanian Law on Copyright and Neighboring Rights no 8/1996.

<sup>66</sup> Art. 2 (1) Berne Convention for the Protection of Literary and Artistic Works.

<sup>67</sup> Art. 1 Romanian Law on Copyright and Neighboring Rights no 8/1996.

<sup>68</sup> Art. 41 (1) Romanian Law on Copyright and Neighbouring Rights no 8/1996.

right is granted, what exactly it entails and the remuneration of the influencer. Otherwise, the influencer or the other party can request the termination of the contract

These are some possible qualifications of influencer agreements and how they look in practice is discussed in the next section. As far as I am concerned, there is no case law as regards the contractual relations between an influencer and a brand or intermediary in Romania, which shows that there is legal uncertainty in this sphere.

### III. Findings of the Empirical Research

The market research that I conducted aimed at getting a general view of the influencer marketing sphere and at looking more closely at the influencer agreements as such. Therefore, I am going to present them in two separate sections. First, the results of the questionnaires are discussed and second, the received contracts are analysed.

#### A. The Questionnaires

The first part of the questionnaire shows that Romanian influencers are indeed involved in the practice of influencer marketing. All influencers who took part in the research responded that they are participating in marketing campaigns. Moreover, the agencies work with influencers as well, as some of them are influencer agencies per se and others are talent agencies which are also preoccupied with promoting influencers. Interesting is that there is also a platform for influencer marketing which connects influencers with brands and which facilitates their business relationship. As such, this platform does not implement the influencers marketing campaigns, but it offers a (virtual) place of business and its team offers support when it is needed.

With regard to how active influencers are in this sphere, the answers vary. Agencies resort to influencers only for a few campaigns per year, several times per month and on a weekly basis but also on a daily basis. The platforms which influencers are most active on are Instagram, Facebook and YouTube but include also (personal) blogs and Twitter. In addition, the most preferred influencers to engage in marketing campaigns are micro influencers, with hundreds of thousands of followers, which shows that brands are looking for a vast audience, rather than a smaller, targeted one. This is also apparent from the fact that agencies prefer to work with maximum ten influencers in a campaign.

In addition, the key objective that companies want to reach is increasing the popularity of the brand and to this end, their plan is to increase the budget for influencer marketing

campaigns for the future. Interesting is also that the success of an influencer marketing programme is measured in engagement most often.

With regard to the use of intermediation, the results show that there is no trend as to whether influencers are represented by an influencer agency or PR agency. Rather, there is a mix of influencers who use intermediation, who were represented by an agency in the past and now they are independent and influencers who are not represented by agencies at all since the beginning. The use or non-use of bilateral or unilateral intermediation is further evidenced by the fact that influencers are concluding agreements more with agencies than directly with the brand. Usually, these are PR agencies which represent the brand.

These influencer agreements are often concluded formally, they are written legal documents, especially when they involve money as opposed to barter. Interesting is also how influencers are contacted sometimes via direct messages on social platforms where they discuss the proposal to participate in a specific campaign. It has been specified also that influencers agencies, when not directly contacted, are put in contact with the brand and formally negotiate the clauses of influencer agreements. This action is gratifying, because it means that influencer agencies, when acting on behalf of the principal are trying to protect the interests of the weaker party, whereas in cases when influencers are concluding themselves the agreements with brands or their agencies, they might be unaware of their rights and duties arising out of the contract because they are not always professionals. As I have already explained before, basic contractual conditions, if not respected, can render the agreements void or can allow a party to terminate the contracts or take other actions. Another fact that raises concerns is that, sometimes, when nano influencers are involved, agreements are concluded via direct message or email, which are nevertheless legally binding agreements. When this is the case, nano influencers might not acknowledge the existence of the actual contractual rights and obligations and the chance of making legal mistakes is much higher.

Concerning the way influencers are remunerated, the research shows that by far the majority are paid with a fixed tax per photo/video/post. The sums of money that we are talking about range from 0, because products are given in exchange for a service (i.e. barter), or otherwise from 100 Euros per post to 30 000 Euros. However, it has been explained that the prices vary depending on the amplitude of the marketing campaign. Seeing what important sums of money are involved in the monetization supply chain, it becomes evident that influencer agreements must be concluded in a legally correct manner.

Still talking about the agreements as such, I have also asked what the most important obligations are in the parties' opinion. Agencies are of the opinion they have the following

obligations: to make sure that the advertisers get what they have agreed upon with the influencer; due diligence in what concerns the commercial aspects of the campaign; the payment; to respect the contract and the aim of the campaign and lastly, the communication of clear, correct and timely information. On the other hand, influencers believe that their main obligations are to respect the brief; to respect both parties' contractual obligations in general, to be transparent when advertising and to respect the deadlines.

In addition, I have also asked from another perspective, namely, what they think the most important obligations they impose on the other party are. The answers revolve around the payment in a timely manner and confidentiality. The acknowledgment of the obligations, of both parties, shows that they are looking for a serious contractual relationship which can only be reached if the influencer agreements are implemented correctly. Lastly, the research shows that information regarding the relationship between an influencer and a brand are mostly disclosed in the (video) description and as I have previously discussed, the (non-)disclosure represents a topic that is currently extensively and elaborately discussed. The main goal of this discussion is to impose on influencer to disclose when advertising.

## B. The Contracts

The contracts which I gathered are named contract for collaboration and assignment of copyright agreement.

The contract for collaboration is an innominate contract which resembles the most to a contractor agreement, because it presupposes the execution of a work or service in exchange for remuneration, whereby the entrepreneur is independent. Therefore, the rules that are applicable to the contractor agreement are applicable to it as well and when something is not dealt with in those rules, the common rules apply.

The received contract contains first of all the object of the contract, which consists in the planning and the execution of a marketing campaign on a website by the entrepreneur (i.e. the influencer) for the promotion of a food product, called "Communication programme". Furthermore, it includes specific instructions given by the beneficiary (i.e. brand or PR agency). The "Communication program" entails:

- (1) making a video in which the food product is promoted;
- (2) a blog post of minimum 350 words in which the food product is being promoted by including pictures with the product and the other necessary ingredients but also pictures with the final recipe next to which the promoted food product must be present as well;

- (3) posting of the video material on Facebook with a hyperlink to the blog article;
- (4) 2 posts on Instagram, one on InstaStories and one on the feed, which refer to the campaign and
- (5) assignment of author rights for the created materials.

Moreover, the time frame, which is agreed upon by the parties, during which the work has to be executed is present, however, it is not very specific. It mentions that the entrepreneur undertakes to start the “Communication programme” as soon as possible after signing the contract.

In addition, the obligations of the parties are present too. The entrepreneur has to execute the “Communication programme” in accordance with the agreed and accepted offer. Furthermore, the beneficiary’s obligations also entail the payment of the entrepreneur, which is also clearly stipulated in the contract, in exchange for the successful execution of the “Communication programme”. Moreover, it is stipulated that the beneficiary is bound to provide support to the entrepreneur for the timely performance of the services, namely:

- (1) to continuously provide information about the promoted food products and services;
- (2) to issue the approvals for the editorial content and for the actions which are necessary for the execution of the “Communication programme” in accordance with the deadlines;
- (3) to make available the necessary products for the realisation of the recipe mentioned in the “Communication programme” and
- (4) to supply and to dispatch the products offered as a prize when a giveaway is made.

Indeed, for this type of innominate contract, the main obligations revolve around the execution of the work by the entrepreneur in exchange for a price. Moreover, it complies also with another main obligation which is the duty of the beneficiary to give instructions to the entrepreneur so that the final work is not only complete but also successful. The given instructions show that the obligations are not restrictive and allow the influencer to execute the work in her own manner and this shows the required independence of the entrepreneur.

Last, other clauses contain the terms for termination, what happens in case of force majeure and some final clauses which, however, do not require an analysis.

The other model of influencer agreement is the assignment of copyright agreement, which must fulfil the conditions enumerated in an anterior section. The influencer agreement provides the object of the contract which constitutes the participation of the assignor (i.e. the influencer) in the promotion of a certain brand on the personal social media pages of the

influencer, more exactly on her Facebook and Instagram page. In addition, the object of the contract also includes the assignment of the copyright right and other connected rights resulting from assignor's provision of service in exchange for remuneration which is clearly stipulated in the agreement.

The obligations of the assignor, which need to be fulfilled in a specified period or until all parties have fulfilled their obligations are the following:

- (1) To make video promotion "call to action";
- (2) To make a video thanking the participants in the promotion;
- (3) To make a video of awarding prizes to underprivileged children;
- (4) To use the image on the promotion website;
- (5) To produce three posts on Facebook and Instagram and
- (6) To make a sandwich recipe that will be posted on the promotion website.

In addition, the contract stipulates that the video and audio recordings resulting from the performance of this contract and any other material made by the assignor in the execution of this contract (including making-of photos and photographs) have as sole purpose the realization of the materials provided in the section relating to the object of the contract, made by the assignee for the benefit of the client, which will be broadcasted on public and private TV channels, internet worldwide, radio and/or on the cinema network on the territory of Romania, LED screens or any other media/public means of communication of the spot thus achieved. Thus, the contract includes clear details as to what exactly this assignment of copyright entails and what the copyright rights consist of.

In relation to the payment, the contract price covers the assignor's performance as well as the assignment of the copyright stipulated in the contract for a period of two months from the date of the first broadcast to the public. In addition, the assignor must provide his consent that during the two months of advertising to the public it is forbidden for him to make advertising spots to any other dairy brand or entity that performs dairy activities, except for those made for the benefit and at the request of the client and/or the assignee.

Moreover, the obligations of the assignee presuppose:

- (1) to pay to the transferor the remuneration agreed upon;
- (2) to provide the assignor with all necessary information regarding the marketing campaign in question as well as the guides needed for posts on Facebook and Instagram;
- (3) to appoint a contact person to work with the assignor to conceive and produce the material;

- (4) to make available to the assignor all the informative materials and test products necessary for drawing up the articles needed for the marketing campaign and
- (5) to provide feedback and approve the post to be published by the assignor.

From the object of the contract and from the parties' obligations, it is visible that the present contract is a mixed contract that combines a contractor agreement with an assignment of copyright agreement. The patrimonial rights that are to be ceded are clearly stated and the way in which they are going to be used is as well. Nonetheless, the remuneration is also stipulated. Therefore, this agreement is in accordance with the law and does not seem to impose any particular restrictions on the influencer.

#### IV. Conclusion

Influencer marketing is a current topic which has been looked at from various points of view, in multiple disciplines, such as social sciences, formal sciences and humanities. From a legal perspective, however, insight into this way of advertising was lacking. Therefore, the present paper offers some clarifications on the contractual relations between an influencer and a brand. More specifically, the paper answered the question of how influencer agreements can be classified according to Romanian law and how the contractual practices between the parties involved in such agreements look like.

In providing the answer, the monetization supply chain of an influencer agreement has been described, which showed that there are three models that illustrate the use of intermediation in the monetization happening in influencer agreements. These are the *bilateral use of intermediation*, in which both the brand and the influencer are represented by an intermediary, the *unilateral use of intermediation*, in which either the brand or the influencer are represented by an intermediary and there is also *no use of intermediation*, when neither the brand nor the influencer resort to intermediation.

Upon this clarifying overview, the influencer agreements have been classified according to Romanian law and these can take the form of several types of contracts. First, an influencer agreement can be a contractor agreement, which implies that the entrepreneur owes the beneficiary the successful execution of a work, either material or immaterial, or provision of service in exchange for a sum of money, which can take several forms. Thus, the main obligations, which are moreover interdependent, of the influencer and of the other contracting party are the execution of and the payment for that work, respectively. In addition, in this type

of contract communication between the parties is important and therefore it is necessary for the beneficiary to provide clear instructions to the entrepreneur as regards the desired result. Second, the influencer agreement can also take the form of a mandate contract, whereby the agent is concluding juridical acts on behalf of the principal. Third, an influencer agreement can also be an assignment of copyright agreement, by means of which the author assigns his patrimonial copyright rights in exchange for a sum of money. In this situation it is important mention, among others, what exactly the copyright entails and the duration of the assignment of copyright. In addition, it has been discussed why influencer agreements are not contracts for work or exchange contracts.

In practice, it has been discovered that influencer agreements are in general innominate contracts which are some mixed contracts that are treated the same way as the types of contracts they resemble the most with. In this paper two model contracts gathered by means of empirical research have been discussed, namely a contract for collaboration and an assignment of copyright agreement. The analysed contracts did not contain any particularly questionable clauses, but clauses which are usual for those types of contracts. Besides the contracts, the questionnaires revealed some interesting information as well, namely, how often agencies or influencers resort to influencer marketing campaigns, the social media platforms which influencers are most active on, how important the sums of money, that influencers are paid for promoting products or services, are. Moreover, influencers conclude not only formal legal agreements but also agreements that do not have the form of a contract as such. It has been revealed that this happens in cases when nano influencers are involved and this represents an issue because they might not realise their rights and obligations arising out of these informal agreements, which are legally binding nevertheless.

As the present paper researched into the contractual practices between an influencer and a brand in the realm of influencer marketing, it hopefully represents a first step for the creation of a regulatory framework of social media, which is inevitably needed.

## V. Bibliography

### A. Primary sources

#### Legislation

##### **Berne Convention 1886**

Berne Convention for the Protection of Literary and Artistic Works 1886.

##### **Directive 2005/29/EC 2005**

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 and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive').

##### **Romanian Civil Code 2011**

Romanian Civil Code 2011.

##### **Romanian Law on Copyright and Neighboring Rights no 8/1996 1996**

Romanian Law on Copyright and Neighboring Rights no 8/1996 1996.

### B. Secondary Sources

#### Articles

##### **Abidin C. 2016**

Cystal Abidin, 'Visibility labour: Engaging with Influencers' fashion brands and #OOTD advertorial campaigns on Instagram' [2016] 161 Media International Australia.

##### **Allemano A. 2018**

Alberto Allemano, 'How to Counter Fake News? A Taxonomy of Anti-fake News Approaches' [2018] 9 European Journal of Risk Regulation.

##### **Bladow E, L. 2018**

Laura E Bladow, 'Worth the Click: Why Greater FTC Enforcement Is Needed to Curtail Deceptive Practices in Influencer Marketing' (2018) 59 WM & MARY L REV.

**Blazevic V. 2013**

Blazevic V, Hammedi W, Garnefeld I, & Rust RT, 'Beyond Traditional Word-of-Mouth: An Expanded Model of Customer Influence' [2013] 24 *Journal of Service Management*.

**Byrne S. 2015**

Shannon Byrne, 'The Age of the Human Billboard: Endorsement Disclosures in New Millennium Media Marketing' [2015] 10 *J. Bus. & Tech. L.*

**Caileanu S. 2018**

Sergiu Caileanu, 'Hidden Vices in the Contractor Agreement' [2018] 124 *REV SOCIETATILOR SI A DREPTULUI COMERCIAL*.

**Donovan D. 2016**

Darren Donovan, *Socio-Legal Methodology: Conceptual Underpinnings, Justifications and Practical Pitfalls*, (Cahillane & Schweppe 2016).

**Elerroega G. 2019**

Gabriel M A Elorreaga, 'Don't Delete That Tweet: Federal and Presidential Records in the Age of Social Media' [2019] 50 *ST MARY'S LJ*.

**Farshidi A. 2018**

Ava Farshidi, 'Evaluating the FTC Endorsement Guidelines Through the Career of a Fashion Blogger' 2018, 9 *Journal of Sports & Entertainment Law*.

**García-Rapp F. 2016**

Florencia García-Rapp, 'The digital media phenomenon of YouTube beauty gurus: the case of Bubzbeauty' [2016] 12 *Int. J. Web-Based Communities*.

**Goanta C. 2018**

Catalina Goanta, 'How Technology Disrupts Private Law: An Exploratory Study of California and Switzerland as Innovative Jurisdictions' [2018] 38 *TTLF Working*.

**Henning-Bodewig F. 2017**

F. Henning-Bodewig, 'Influencer-Marketing – der „Wilde Westen des Werbens“?' [2017] 12 Wettbewerb in Recht und Praxis.

**Madalina N 2018**

Nica Elena Madalina, 'Utilizarea internetului si a social media' [2017] 3 Universul Juridic.  
Sophie C Boerman, Natali Helberger, Guda van Noort & Chris J Hoofnagle, 'Sponsored Blog Content: What Do the Regulations Say: And What Do Bloggers Say' [2018] 9 J INTELL PROP INFO TECH & ELEC COM L.

**Mathur A. 2018**

Arunesh Mathur, Arvind Narayanan, 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.

**Sarabdeen J. 2014**

Jawahitha Sarabdeen, 'Legal Risks in Social Media Marketing' [2014] 4 International Journal of e-Education, e-Business, e-Management and e-Learning.

**Sauerborn C. 2018**

Christina Sauerborn, 'Making the FTC : An Approach to Material Connections Disclosures in the Emoji Age' [2018] 28 FORDHAM INTELL PROP MEDIA & ENT LJ.

**Sconyers A. 2018**

Adrienne Sconyers, 'Corporations, Social Media, & Advertising: Deceptive, Profitable, or Just Smart Marketing' [2018] 43 J CORP L.

**Thomas P. 1986**

P Thomas, 'Curriculum Development in Legal Studies' [1986] 20 Law Teacher.

**Tita-Nicolescu G. 2018**

Gabriel Tita-Nicolescu, 'Classification of Contracts under the New Civil Code' [2018] 7 REV UNIVERSUL JURIDIC.

**Veirman De M. 2017**

Marijke De Veirman, Veroline Cauberghe, Liselot Hudders, 'Marketing through Instagram influencers: the impact of number of followers and product divergence on brand attitude' [2017] 36 International Journal of Advertising.

## Books

**Baias F. 2014**

Flavius-Antoniou Baias, Eugen Chelaru & others, *Noul cod civil comentariu pe articole* (Editura C.H Beck 2014).

**Deak F. 2017**

Francisc Deak, Lucian Mihai & Romeo Popescu, *Tratat de drept civil* (Universul Juridic 2017, Vol 2).

**Harosa L. 2017**

Liviu Marius Harosa, *Bunurile incorporale si proprietatea virtuala* (Universul juridic 2017).

**Morris C. 2011**

Caroline Morris, Cian Murphy, 'Legal Research Methodologies', *Getting a PhD in Law*, (Hart Publishing 2011).

**Pop I. 2015**

L. Pop. I. Popa, S. I. Vidu, *Curs de drept civil, obligatiile*, (Universul juridic 2015).

**Snel M. 2018**

Marnix Snel, Janaina de Moraes, 'Doing a systematic literature review in legal scholarship', (Eleven International Publishing, 2018).

## Internet sources

**Campbell A. 2018**

Andy Campbell, 'PewDiePie's excuse for promoting racist YouTube content includes more racist content' [2018] Huffington Post  
<<https://www.huffpost.com/entry/pewdiehttps://www.huffpost.com/entry/pewdiepies-excuse->

[for-promoting-racist-youtube-content-includes-more-racist-content\\_n\\_5c1027e4e4b00e17a533cb0dpies-excuse-for-promoting-racist-youtube-content-includes-more-racist-content\\_n\\_5c1027e4e4b00e17a533cb0d](#)> accessed 15<sup>th</sup> July 2019.

### **Competition and Market Authority 2019**

Competition and Market Authority, 'An Influencer's Guide to making clear that ads are ads', <<https://www.asa.org.uk/news/new-guidance-launched-for-social-influencers.html>> accessed 15 July 2019.

### **Google 2019**

Google, 'How AdSense works' Google Support <<https://support.google.com/adsense/answer/6242051?hl=en>> accessed 15<sup>th</sup> July 2019.

### **Gross G. 2015**

Grant Gross, 'Paid, non-disclosed Xbox One endorsements land Machinima in hot water with FTC' [2015] PCWorld <<https://www.pcworld.com/article/2979701/paid-endorsements-get-xbox-one-marketer-in-trouble-with-ftc.html>> accessed 15<sup>th</sup> July 2019.

### **Federal Trade Commission 2019**

Federal Trade Commission, 'FTC and FDA Send Warning Letters to Companies Selling Flavored E-liquids About Social Media Endorsements without Health Warnings' [2019] Federal trade commission <<https://www.ftc.gov/news-events/press-releases/2019/06/ftc-fda-send-warning-letters-companies-selling-flavored-e-liquids>> accessed 15<sup>th</sup> July 2019.

### **Humay 2019**

Humay, 'What are nano, micro, macro and mega influencers and why you should care' [2018] Inflowlabs <<https://inflowlabs.com/2018/01/09/nano-micro-macro-mega-influencers-care/>> accessed 15<sup>th</sup> July 2019.

### **Internet World Stats 2019**

Internet world Stats, 'Internet usage statistics' [2019] Internet World Stats <<https://www.internetworldstats.com/stats.htm>> accessed 15<sup>th</sup> July 2019.

**Izea 2019**

Izea, 'How to create a social media influencer agreement' [2019] Izea <<https://izea.com/2019/01/08/create-social-media-influencer-agreement/>> accessed 15<sup>th</sup> July 2019.

**Kemp S. 2019**

Simon Kemp, 'Digital 2019: Global internet use accelerates' [2019] We are social <<https://wearesocial.com/blog/2019/01/digital-2019-global-internet-use-accelerates>> accessed 15<sup>th</sup> July 2019.

**Kite 2019**

Kite, 'The Rise of Influencer Merchandising' [2018] < <https://www.kite.ly/blog/rise-influencer-merchandising/>> accessed 15 July 2019.

**Knitter M. 2019**

Margret Knitter, 'Recent Case Law Clarifies Influencer Marketing and Labeling Requirements in Germany', [2019] INTABulletin <[https://www.inta.org/INTABulletin/Pages/Influencers\\_and\\_Labelling\\_in\\_Germany\\_7401.aspx](https://www.inta.org/INTABulletin/Pages/Influencers_and_Labelling_in_Germany_7401.aspx)> accessed 15<sup>th</sup> July 2019.

**Linqia 2019**

Linqia, 'The State of Influencer Marketing' [2018] Linqia; K. Gallagher, 'The Influencer Marketing Report: Research, strategy & platforms for leveraging social media influencers' [2018] Business Insider < <https://www.businessinsider.com/the-influencer-marketing-report-2018-1>> accessed 15<sup>th</sup> July 2019.

**Manafu C. 2019**

Cristian Manafu, '19 agenții de influencer marketing din România' [2018] Manafu <<https://www.manafu.ro/2018/08/agentii-de-influencer-marketing-din-romania/>> accessed 15 July 2019.

### **Sharkey L. 2019**

Lauren Sharkey, 'Influencers are giving inaccurate dietary advice at alarming levels, according to this study' [2019] Bustle <<https://www.bustle.com/p/influencers-are-giving-inaccurate-dietary-advice-at-alarming-levels-according-to-this-study-17283387>> accessed 15<sup>th</sup> July 2019.

### **Riego Del A. 2009**

Alissa Del Riego, 'Digest Comment-Context for the Net: A Defense of the FTC's New Blogging Guidelines' [2009] Jolt Digest <<https://jolt.law.harvard.edu/digest/digest-comment-context-for-the-net-a-defense-of-the-ftc-e2-80-99s-new-blogging-guidelines>> accessed 15 July 2019.

### **Vujenny 2019**

Vujenny, 'Mega-, macro-, micro- and nano-influencers — What's the difference, and which should you use for your brand?' [2018] Medium <<https://medium.com/@vujenny/mega-macro-micro-and-nano-influencers-whats-the-difference-and-which-should-you-use-for-9839bb3055ae>> accessed 15<sup>th</sup> July 2019.

### **Werberat 2019**

Werberat, 'Ethik-kodex der werbewirtschaft' [2019] Werberat <[https://werberat.at/layout/ETHIK\\_KODEX\\_2\\_2019.pdf](https://werberat.at/layout/ETHIK_KODEX_2_2019.pdf)> accessed 15<sup>th</sup> July 2019.

Other legislative documents

### **Consiliul roman pentru publicitate 2018**

Consiliul roman pentru publicitate, 'Codul de practica in comunicarea comerciala' [2018].

### **European Commission 2018**

Commission, 'Behavioural study on advertising and marketing practices in online social media' COM (2018) 85 01 final.

### **Redactia 2017**

Redactia, 'Cum recunoaştem escrocheriile privind locurile de muncă și angajarea?' [2017] 2 Legestart.

**Stoicescu B. 2018**

Bogdan Stoicescu, 'ACTIUNEA 1[1]-Rezolvarea Provocarilor Fiscale aduse de Economia Digitala' [2018] 2 Revista societăților și a dreptului comercial.