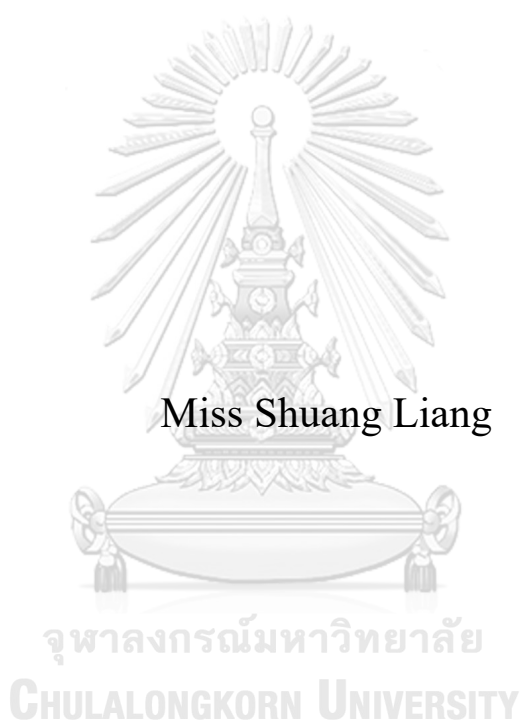

A Comparative Study of Consumer Protection Regulation in the
Case of Online Influencers' Hidden Advertisement: Towards the
Development of a Universal Regulatory Framework



A Thesis Submitted in Partial Fulfillment of the Requirements
for the Degree of Master of Laws in Business Law

FACULTY OF LAW

Chulalongkorn University

Academic Year 2022

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ศึกษาเปรียบเทียบการใช้เทคโนโลยีเกี่ยวกับการคุ้มครองผู้บริโภคในกรณีโฆษณาแอบแฝง โดยผู้มี
อิทธิพลออนไลน์: เพื่อการพัฒนากรอบการกำกับดูแลในระดับสากล



วิทยานิพนธ์นี้เป็นส่วนหนึ่งของการศึกษาตามหลักสูตรปริญญาวิทยาศาสตรมหาบัณฑิต
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จุฬาลงกรณ์มหาวิทยาลัย
CHULALONGKORN UNIVERSITY

Thesis Title A Comparative Study of Consumer Protection
Regulation in the Case of Online Influencers' Hidden
Advertisement: Towards the Development of a
Universal Regulatory Framework
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ชวง เหลียง : ศึกษาเปรียบเทียบการใช้กฎเกณฑ์เกี่ยวกับการคุ้มครองผู้บริโภคในกรณีโฆษณาแอบแฝงโดยผู้มีอิทธิพลออนไลน์: เพื่อการพัฒนากรอบการกำกับดูแลในระดับสากล. (A Comparative Study of Consumer Protection Regulation in the Case of Online Influencers' Hidden Advertisement: Towards the Development of a Universal Regulatory Framework) อ.ที่ปรึกษาหลัก : สุรัชดา วิถี

สื่อสังคมออนไลน์ (Social Media) เป็นสื่อที่มีอิทธิพลอย่างมากในสังคมปัจจุบัน ข้อมูลทางสถิติแสดงให้เห็นว่า TikTok เป็นหนึ่งในแพลตฟอร์มสื่อสังคมออนไลน์ชั้นนำ ที่มีผู้ใช้งานมากกว่า 600 ล้านคน ความนิยมของแพลตฟอร์มเหล่านี้นำไปสู่การเพิ่มขึ้นของ "ผู้มีอิทธิพล" (Influencers) ซึ่งเป็นบุคคลที่มีกลุ่มผู้ติดตาม (Followers) อย่างชัดเจนและแข็งแกร่ง โดยการสร้างปฏิสัมพันธ์กับผู้ติดตามผ่านกิจกรรมออนไลน์ เช่น การโพสต์ (Post) รูปถ่ายและวิดีโอสั้น ๆ บนแพลตฟอร์ม เนื่องจากกิจกรรมออนไลน์เหล่านี้ได้รับความสนใจอย่างมากจากผู้ติดตาม ดังนั้นผู้มีอิทธิพลอาจได้รับผลประโยชน์ซึ่งส่วนใหญ่รวมถึงผลประโยชน์ทางการเงินโดยตรงจากการโฆษณาผลิตภัณฑ์ และผลประโยชน์ทางการเงินโดยอ้อม เช่น ได้รับผลิตภัณฑ์โดยไม่ค่าใช้จ่าย

วิทยานิพนธ์ฉบับนี้มุ่งสำรวจปัญหาทางกฎหมายที่เกี่ยวข้องกับโฆษณาที่แอบแฝงอยู่ในกิจกรรมออนไลน์ (Hidden Advertisement) ของผู้มีอิทธิพลเหล่านี้ ซึ่งผู้มีอิทธิพลได้ใช้ประโยชน์จากความไว้วางใจจากผู้ติดตาม ในการแอบแฝงโฆษณาที่ได้รับการสนับสนุนในเนื้อหาในรูปแบบต่างๆ เช่น ข้อความ รูปภาพ และวิดีโอสั้นๆ บนแพลตฟอร์มของพวกเขา โดยไม่มีการระบุหรือแจ้งให้ทราบโดยชัดเจนและโดยตรงว่าเนื้อหาเหล่านี้แท้จริงแล้วเป็นโฆษณา เนื้อหาดังกล่าวส่งผลกระทบต่อคุ้มครองสิทธิและผลประโยชน์ของผู้บริโภค และอาจทำให้ผู้บริโภคเกิดความเข้าใจผิด ดังนั้น วิทยานิพนธ์ฉบับนี้จึงมุ่งที่จะศึกษากรอบกฎหมายในปัจจุบันเกี่ยวกับโฆษณาแอบแฝงดังกล่าว ในประเทศและภูมิภาคต่างๆ ได้แก่ สหรัฐอเมริกา สหราชอาณาจักร สหภาพยุโรป แคนาดา สมาคมประชาชาติแห่งเอเชียตะวันออกเฉียงใต้ (อาเซียน) และจีน

เนื่องจากหลักเกณฑ์ทางกฎหมายเกี่ยวกับโฆษณาแอบแฝงยังอยู่ในช่วงเริ่มต้นของการพัฒนา วิทยานิพนธ์ฉบับนี้จึงตั้งสมมติฐานว่า ปัญหาโฆษณาแอบแฝงโดยผู้มีอิทธิพลทางออนไลน์อาจบรรเทาได้โดยการสร้างกรอบการกำกับดูแลสากล (Universal Regulatory Framework) ที่มีความชัดเจน เพื่อวัตถุประสงค์ในการลดการใช้สื่อโฆษณาแอบแฝงและเพื่อเสนอแนวทางการกำกับดูแลเป็นการทั่วไปที่เกี่ยวข้องกับการรับประกันผลประโยชน์ตอบแทนของผู้ติดตามโซเชียลมีเดียเพื่อแลกเปลี่ยนกับการโฆษณาผลิตภัณฑ์ นอกจากนี้ วิทยานิพนธ์ฉบับนี้ยังได้ศึกษาถึงปัญหาการขาดธรรมาภิบาล และประเด็นเกี่ยวกับการบังคับใช้กฎหมายอีกด้วย โดยท้ายที่สุด ได้เสนอแนะแนวทางแก้ไขปัญหาดังกล่าว โดยการใช้อำนาจการกำกับดูแลสากลเพื่อประโยชน์ในการควบคุมโฆษณาแอบแฝงของผู้มีอิทธิพลทางออนไลน์อย่างมีประสิทธิภาพยิ่งขึ้น

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ลายมือชื่อนิติกร
ลายมือชื่อ อ.ที่ปรึกษาหลัก

6384501934 : MAJOR BUSINESS LAW

KEYWORD: hidden advertisement, Internet, online influencers, comparative study, consumer protection

Shuang Liang : A Comparative Study of Consumer Protection Regulation in the Case of Online Influencers' Hidden Advertisement: Towards the Development of a Universal Regulatory Framework. Advisor: Asst. Prof. SURUTCHADA REEKIE, Ph.D.

Social media has become highly influential, with statistics showing that TikTok, one of the leading social media platforms, has over 600 million active users. The popularity of these platforms has led to a rise of "influencers" who are individuals with a strong targeted audience of followers, carefully built through their online activities such as posting photographs and short videos on the platforms. As their posts attract significant attention from their followers, the influencers may, in return for commercial products being featured on their posts, receive benefits which mainly include direct financial benefits, and indirect financial benefits such as free products.

This study explores the legal problems relating to online influencers' hidden advertisement. Arguably, influencers exploit the trust of their fans by posting sponsored advertisement in the forms of text, photographs, and short videos on their social platforms without clearly marking them as, or directly indicating that they are, advertisement. Such content impacts the protection of consumers' rights and interests, and may be perceived as misleading. This study, therefore, seeks to examine the current legal frameworks on hidden advertisement in several countries and regions, namely: the United States, the United Kingdom, the European Union, Canada, the Association of Southeast Asian Nations (ASEAN), and China. As the regulation of hidden advertisement is arguably on an early stage of development, this study hypothesizes that online influencers' hidden advertisement could be reduced by an introduction of a universal regulatory model which offers a clear framework for reducing hidden advertising and offer a general guidance in the area of influencers' advertising sponsorship. The study will also discuss the problems of a lack of governance and legislation in the area. Finally, the study will propose possible solutions for a universal regulation framework to better regulate online influencers' hidden advertisement.

Field of Study: Business Law
Academic Year: 2022

Student's Signature
Advisor's Signature

ACKNOWLEDGEMENTS

First of all, I would like to give my heartfelt thanks to all the people and friends who helped and supported me in this thesis.

My sincere thanks and appreciations go firstly to my advisor, Assistant Professor Dr. Surutchada Reekie, whose suggestions and encouragement have given me much help with these studies and revisions. I truly appreciate the committee members' valuable comments and opinions on this thesis.

In addition, many thanks go to my family members and my boyfriend for their unconditional love and support.

I am also grateful to all my friends who have comforted me a lot during the writing.

Finally, I appreciate all those who help me, care about me, and wish me the best.

Shuang Liang

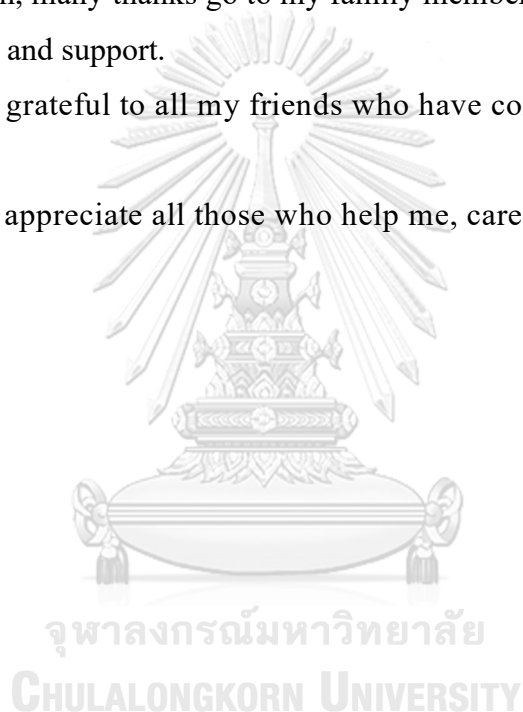


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Chapter.1 Introduction

1.1. Background and Importance of the Study

In 2022, statistics showed that more than 75% of the brand marketing crews intend to dedicate a budget to influencer marketing¹. By 2023, influencer marketing expenditure is projected to reach 4.6 billion dollars in the United States alone². In fact, Activate by Bloglovin's research has found that 67 percent of marketing crew think influencer marketing campaigns helped them reach a more targeted audience, thus leading to more impactful results³. In Italy, a university called "eCampus" also offers a three-year degree program for cultivating Internet influencers⁴. In this context, the influencer market is showing a thriving state.

Taking China as an example, until December 2021, the number of Internet users in China was 1.032 billion, the number of mobile Internet users was 1.007 billion, and the Internet penetration rate reached 73%⁵. Among them, it is worth noting that the

¹ Santora, Jacinda. 2022. "Key Influencer Marketing Statistics You Need to Know For 2022". Influencer Marketing Hub. Available at <https://influencermarketinghub.com/influencer-marketing-statistics/>. (Accessed 9/6/2022).

² Ibid.

³ Noxinfluencer. 2018. "Influencer Marketing In 2018: Becoming an Efficient Marketplace". Available at <https://www.noxinfluencer.com/blog/influencer-marketing-in-2018-becoming-an-efficient-marketplace/>. (Accessed 21/5/2022).

⁴ Cerullo, Megan. 2019. "Italian University Offers Degree in How to Become an Online Influencer". Cbsnews.Com. Available at <https://www.cbsnews.com/news/influencer-marketing-degree-italian-university-e-campus-offering-three-year-influencer-degree/>. (Accessed 21/5/2022).

⁵ China Internet Network Information Center (CNNIC). 2022. "The 49Th Statistical Report on China's Internet Development". Available at <https://www.cnnic.com.cn/IDR/ReportDownloads/202204/P020220424336135612575.pdf>. (Accessed 21/5/2022).

size of online video (including video clips) users in China has reached 975 million by 2021⁶. Moreover, the 49th Statistical Report on China's Internet Development shows that in regulating search advertising, relevant departments have increased the penalties for illegal medical advertisements⁷. Some public agencies have also imposed administrative penalties on some search engines, without mentioning other parts of advertising⁸.

With the prosperity of influencer marketing, several drawbacks have also begun to appear: hidden advertisement, fake followers, bots, and so on⁹. Therefore, influencer marketing has not only caused distrust amongst some online consumers but has also begun to attract the attention of relevant domestic and foreign administrative agencies that specialize in regulating advertising activities and protecting consumer interests. They began to focus on online influencer marketing as they tried to protect the interests of consumers.

On the other hand, given the effectiveness of influencer marketing effects and the unlimited market prospects, more and more marketing crews expect to increase their budgets in influencer marketing. Nevertheless, those engaged in influencer marketing activities, including advertisers, are also aware of the negative effects of the drawbacks mentioned above and begin to pay attention to standardizing their behavior to reshape online consumer trust.

⁶ Ibid., p.44.

⁷ Ibid., p.30.

⁸ Ibid., p.30.

⁹ Xinhuanet. 2022. "国家网信办专项整治互联网用户账号运营乱象 (Cyberspace Administration Of China Overhauls The Internet User Account Operation Chaos)". Available at http://www.news.cn/politics/2021-10/19/c_1127974711.htm. (Accessed 21/5/2022). (Chinese language, translation by the author).

1.2. Research Question

This thesis aims to examine the questions raised by online hidden advertising in the influencer market. Specifically, this thesis emphasizes consumer protection for the audience of dishonest influencers' hidden advertising tactics. Thus, the following research questions will be explored in this thesis:

(1) From a general understanding of hidden advertising, how may the online influencers' hidden advertisement harm consumers' rights?

(2) From the comparative perspectives of major English-speaking countries and major economies, how do the current laws and regulations deal with the emerging influencer market regarding the issue of hidden advertising to protect consumers?

1.3. Hypothesis

As the existing domestic and regional legal regulatory frameworks of the major English-speaking countries and regions remain insufficient to deal with the problem of hidden advertisement by online influencers, the problem may be reduced by an introduction of a solution that may be applied universally, which comprises elements of legal foundation, industry self-regulatory supervision, and social supervision.

1.4. Scope of the Research

This study will focus on legal issues relating to consumer rights raised by online influencers' hidden advertisement. The thesis will not cover other matters such as antitrust laws and intellectual property issues in social media platforms that are also found in the influencers market.

This study will explore these issues from the perspectives of the major English-speaking countries and major economies: the United States (hereinafter, "the U.S."), the United Kingdom (hereinafter, "the U.K."), the European Union (hereinafter, "the EU"), Canada, the Association of Southeast Asian Nations (hereinafter, "ASEAN") and China. Those countries and regions are chosen because they broadly and clearly demonstrate the current development of laws and regulations in the field. This thesis will study the different regulatory approaches in the above countries or regions, to propose a possible universal regulatory framework to improve the solution of hidden advertising.

In the analysis of the law, it should be noted that some countries or regions may not currently have any law that specifically and directly applies to online influencers' hidden advertisement. However, from the misleading and deceptive characteristics of hidden advertisement, most countries' consumer protection regulations of misleading and deceptive advertising can be indirectly applied to hidden advertising in influencer marketing. Therefore, in the analysis of the legal framework of Chapter 3, the focus will be placed on jurisdictions such as the U.S. and the U.K. that have clear and explicit regulations and guidance on advertising in influencer marketing, while for those jurisdictions that do not have direct regulations or guidance, the author will focus on other possible applicable legal and regulatory tools for the protection of consumers from false and misleading advertising, which match the nature and characteristics of the hidden advertisement.

This study will also discuss the self-regulations of consumer protection and advertising that restrain false and misleading advertising employed by businesses. The study will also examine the challenges and difficulties that the above solutions may bring.

1.5. Methodology of the Research

The research questions will be answered by documentary research. Primary and secondary data will be used to examine the problem and provide an appropriate solution for the influencer market and the platforms behind it. Data will be collected from various sources such as laws, directive orders, reports, journal articles, thesis, and other research papers, either published on paper or in digital format.

1.6. Contribution of the Research

This thesis will contribute to a better understanding of the current legal limitations of online influencers' hidden advertisement to demonstrate possible solutions by introducing a universal regulatory framework, such as improving the legislation and legal interpretation. Based on the existing materials, relatively little academic literature has been found to discuss the comparative research of hidden advertisement in the field of law in detail. This paper will also provide relevant knowledge and cases about influencers and influencer marketing.

Additionally, this thesis will also contribute to the understanding of the legal framework related to online influencers' hidden advertisement in the U.S., the U.K., the EU, Canada, ASEAN, and China through the comparative study. Moreover, in a comparative analysis of the regulatory approaches and solutions of consumer protection in those jurisdictions, the thesis will conclude the knowledge and experience that can be contributed to addressing the consumer protection concern of online influencers' hidden advertisement for further study.

Chapter.2 Development of Online Influencers' Advertisement

An influencer is an individual with a large or targeted audience of followers who has the potential to affect the purchase decisions of others and who may be approached by brands to promote their products or services¹⁰. Nevertheless, there are still many opinions and criteria for who can be influencers and the difference in their influence. Although the public often uses social media applications for pleasure, they rarely think about the legal issues of what can be hidden in the posts published by influencers. Even if, at times, the audience encounters influencers' posts with tags such as "Ad" and "Advertisement" they seldom think about why influencers tag them, or what their reasons are for tagging them in this manner. In addition, some posts, with a clearly commercial feature, are not tagged as an advertisement at all, leading to the problem of hidden advertisement. The provisions on online hidden advertising are not consistent from country to country. However, every country is resistant to such advertising that deceives the audience and misleads their purchasing choices. In terms of legal analysis, such intentional deception and misleading are suspected of violating consumers' legal rights.

This chapter will introduce the concepts and examples of influencers and hidden advertisement related to the topic of this study, and will compare and contrast traditional advertisement to reflect the characteristics and advantages of current online advertising, to explain why a significant sector of the public is driven to buy the recommended products or services because of influencers' suggestions explained by

¹⁰ ICAS. 2022. "Advertising Guidelines for Social Media Influencers • ICAS". Available at <https://icas.global/advertising-self-regulation/influencer-guidelines/>. (Accessed 18/5/2022).

Unique Selling Proposition theory and Herding theory. These presentations can help understand the need to regulate online influencers' hidden advertising.

2.1. Important Concepts

This section will introduce some concepts and examples of online influencers' hidden advertisement to better understand the relevant background and knowledge.

2.1.1. What is An Influencer?

The term "influencer" can be traced back to 1660, when the British philosopher Henry More referred to the kings as "leaders and influencers of the entire church"¹¹.

Similar to influencers are Key Opinion Leader (KOL), Internet celebrity, and other terms. Nevertheless, take a closer look at the definition of Key Opinion Leader. This term can be traced back to the opinion leadership that comes from the theory of two-step flow of communication propounded by Paul Lazarsfeld and Elihu Katz¹². The opinion leader in the context of marketing was defined as an attractive person, by his/her qualities of psychological, physical, and social, whose knowledge of a given field is considered credible. Opinion leaders can be different from an influencer, influencer acts as opinion leader in a network¹³. Nevertheless, the similarity between

¹¹ More, Henry. 1664. *A Modest Enquiry into The Mystery of Iniquity*. London: printed by J. Flesher for W. Morden bookseller in Cambridge. Available at <https://quod.lib.umich.edu/e/eebo/A51307.0001.001?rgn=main:view=fulltext> (Accessed 21/5/2022).

¹² Katz, Elihu, and Paul F Lazarsfeld. 2017. *Personal Influence: The Part Played by People in The Flow of Mass Communications*. Routledge, 309-334.

¹³ Rehman, Ateeq Ur, Aimin Jiang, Abdul Rehman, Anand Paul, Sadia din, and Muhammad Tariq Sadiq. 2020. "Identification and Role of Opinion Leaders in Information Diffusion for Online Discussion Network". *Journal Of Ambient Intelligence and Humanized Computing*, 1-13. doi:10.1007/s12652-019-01623-5.

opinion leaders and influencers is that they both use their influence to influence or persuade the audience's decision.

"Influencer Marketing" by Brown and Hayes describes the influencer as a third party who significantly shapes the customer's purchasing decision but may never be accountable for it¹⁴. While, according to Keller and Berry, influencers are well-connected, create an impact, have active minds, and are trendsetters¹⁵.

There is no widely accepted explanation for the narrow concept of influencers. Nevertheless, what can be found from past perceptions is that influencers cannot be separated from their follower base. An influencer is a word surrounded by their followers and the stream behind them. The influencer is a byproduct of the prosperity of social platforms¹⁶.

If online influencers want to showcase their charisma, they cannot do so without a stage - social media, which includes Facebook, TikTok, etc., which are familiar to the general public. Influencers are active bodies on these social platforms, but not all people who use these social media can be considered as influencers. In other words, just posting some videos or photos on social platforms is not enough to be identified as an influencer. Back to the word itself, it includes the word "influence". Definitely, influencers are those who have an influence on social media, but measuring the degree of "influence" is a complex process and it involves many factors. Nevertheless, it seems that a person's influence can be shown by the number of his/her followers.

¹⁴ Brown, Duncan, and Nick Hayes. 2008. *Influencer Marketing*. Amsterdam: Elsevier/Butterworth-Heinemann, 50.

¹⁵ Keller, Edward, and Jonathan Berry. 2003. *The Influentials*. Free Press, 27-78.

¹⁶ Hitt, Tarpley. 2018. "The Inscrutable Rise of The Online 'Influencer'". *The Daily Beast*. Available at <https://www.thedailybeast.com/the-inscrutable-rise-of-the-online-influencer>. (Accessed 21/5/2022).

However, the number of followers is not the only criterion. As of May 6, 2022, on Twitter, Donald Trump has over 32.6 million followers, while Elon Musk has 91.1 million followers. It's hard to tell which of the two has more influence just from the number of followers, so the number of followers can be a factor in measuring how influential an influencer is but not the only factor.

Similarly, the influence of influencers will vary in different ways. For example, Jeffree Star is a leader in the cosmetics field as an influencer¹⁷, but few people may know him in other fields. In general, his more than sixteen million followers on YouTube also suggest that influencers have a strong appeal in his/her field of business¹⁸.

Although many examples of influencers and related concepts have been introduced in the previous section, even though the detailed official concept of influencer is still unclear, in order to demonstrate the scope of the study better, the scope of influencers in this study could be the person who encourages others to take an interest in them by posting on online social media to share and promote items. However, it is worth noting that the boundary between influencers and Internet celebrities or any influential person online, be it a businessman, blogger, or model is blurry. For example, Kim Kardashian, who could fit into most of those categories, it might be hard to say she is a celebrity or influencer¹⁹. Nevertheless, the influencers

¹⁷ Robehmed, Natalie. 2018. "Highest-Paid Youtube Stars 2018: Markiplier, Jake Paul, Pewdiepie and More". Forbes. Available at <https://www.forbes.com/sites/natalierobehmed/2018/12/03/highest-paid-youtube-stars-2018-markiplier-jake-paul-pewdiepie-and-more/?sh=358a4c6f909a>. (Accessed 21/5/2022).

¹⁸ More information and videos about Jeffree Star can be found at <https://www.youtube.com/user/jeffreestar> (Accessed 9/6/2022).

¹⁹ Sweeney, Deborah. 2011. "Kim Kardashian's Most Successful Business Ventures". Forbes. Available at <https://www.forbes.com/sites/deborahsweeney/2011/11/02/kim-kardashians-most-successful-business-ventures/?sh=195959d05f41>. (Accessed 21/5/2022).

who have such a massive impact on the audience like Kim Kardashian are rare. All in all, the influencer is the person who will make posts on their social media channels, like YouTube, TikTok, and so on, to attract a large number of followers, who pay close attention to these views²⁰.

2.1.2. What is Hidden Advertisement?

When the public is browsing Facebook or TikTok, it is easy to view information or videos about an influencer. The influencer will show and describe his/her latest favorite items on social media. Not just one item, but in fact, multiple brands and items may appear in these messages that are posted. At first view, the audience may believe that such contents are simply shared by the influencer, and that the influencer does like or love the product or service so much that he/she is willing to endorse it.

As another example, some influencers start a video or text posted on a social media application by making a point to emphasize that there are no advertisements in the video or message. The influencer will then showcase several products, some of which may be products that are indeed known and highly regarded by the general public. At the same time, there are other products that the audience was previously unaware of, or unfamiliar with. When the influencer indicates in their video or message, "I've used them all and love them". With the backing and help of a product that is known to be well-received, and the sincere recommendation of the influencer,

²⁰ On the website of Influencer Marketing Hub, Jacinda Santora, who is a copywriter and marketing consultant, classified 4 types of influencers by follower numbers, which are Mega-Influencers with more than 1 million followers on at least one social platform; Macro-Influencers with a range between 40,000 and 1 million followers on a social network; Micro-Influencers with a range between 1,000 and 40,000 followers on a single social platform; and Nano-Influencers with fewer than 1,000 followers. See: <https://influencermarketinghub.com/types-of-influencers/#toc-0> (Accessed 9/6/2022).

the audience may be attracted to the new products that the influencer recommends, products that are not particularly familiar.

The famous Korean stylist Han Hye-yeon (한혜연) ran her personal channel "Shususu TV (슈스스 TV)" on YouTube, and there was a category in it: I pay for it (내돈내산 (내 돈 주고 내가 산))²¹. In her category, Han Hye-yeon would show some products that she spent money on and recommended them. Nevertheless, then it was revealed that some of the products were actually advertisements and belonged to PPL (in Korea, it is the abbreviation of the public for such advertisement)²². On October 17, 2020, Han Hye-yeon uploaded an apology video for the incident that was not clearly marked by the advertisement on YouTube. She said she was sorry for the confusion caused by her actions and said that she would try to create a better channel in the future, while thoroughly managing and complying with the relevant regulations²³.

An influencer is portrayed in a moment of her/his everyday life while, in a casual and private way, a product appears in the image or the shot with the brand in plain view. Or, in the context of a "normal" conversation via social media, the influencer shows her/his endorsement for a product or a service, generating an advertising effect that is not explicitly disclosed. In other words, he/she seems to act

²¹ Dispatch. 2020. "한혜연 집단 소송한다는 서울대 로스쿨 학생들...에초 강민경도 소송 대상이었다"("SNU Law School Students Claiming Han Hye-Yeon Class Action Lawsuit... Kang Min-Kyung Was Also The Subject Of A Lawsuit. "). Available at <https://www.dispatch.co.kr/2108448>. (Accessed 21/5/2022). (Korean language, translation by the author).

²² Creatrip. 2021. "Controversy of Product Placement (PPL) In Korean Television". Available at <https://www.creatrip.com/en/blog/10066>. (Accessed 21/5/2022).

²³ As of May 7, 2022, the apology video has not been found on Han Hye-yeon's YouTube channel, but there are still many relevant news reports on the Internet about her concealing the fact of advertising. For example, see <https://www.dispatch.co.kr/2091887> (Accessed 9/6/2022).

spontaneously or to express an objective and private opinion, while in fact, he/she is paid (in cash, or receiving the free sample, or another kind of benefits) for his/her comments and endorsement. Influencers take advantage of the audience's trust and mislead the audience as well. These statements make them be private sharing and feelings, and influencers deliberately conceal or mislead the background that they have received benefits from advertisers or brands. After all, the audience cannot see the mark "advertising" or "sponsored" in that promotion video. Moreover, there is no trace of being sponsored by the influencer's content. In those mentioned examples, the hidden behaviors of the influencer are likely to fall into the scope of hidden advertising.

However, it should be clear that hidden advertisement differs from native advertisement. Native advertisement is a sales pitch disguised to be integral to the site^{24,25}. Or native advertising is a type of brand-generated content. It refers to a brand's practice of creating an advertisement message that seamlessly integrates into other content presented on a given platform²⁶. What's more, product placement is defined as "a paid product message aimed at influencing movie (or television) audiences via the planned and unobtrusive entry of a branded product into a movie (or television program)"²⁷. Those kinds of advertising are different in some way from

²⁴ Mara Einstein, "Native Advertising: Publishers as Marketers" in *Black Ops Advertising: Native Ads, Content Marketing, and the Covert World of the Digital Sell* (New York: OR Books, 2016), 83.

²⁵ Mara Einstein described native advertisement in his chapter "Native Advertising: Publishers as Marketers" as "native advertising doesn't look like advertising. It fits seamlessly into the flow of the publication." (See Footnote 24 above, p.84)

²⁶ Wojdyski, Bartosz W., and Nathaniel J. Evans. 2015. "Going Native: Effects of Disclosure Position and Language on The Recognition and Evaluation of Online Native Advertising". *Journal Of Advertising* 45 (2): 157-168. doi:10.1080/00913367.2015.1115380.

²⁷ Balasubramanian, Siva K. 1994. "Beyond Advertising and Publicity: Hybrid Messages and Public Policy Issues". *Journal Of Advertising* 23 (4): 31. doi:10.1080/00913367.1943.10673457.

hidden advertisement. Native advertisement can be incarnated as part of web pages, characterized by their naturalness and integration²⁸. Product placements are more used in film and television works, making advertising part of the storyline²⁹.

The category of advertisement is quite complex and beyond the scope of this research. Therefore, influencers use their own popularity to introduce or recommend or endorse products in the name of "purchased with my own money" and "my own daily used products" by publishing videos, photos, etc. on social media, but in fact, it is sponsored by advertisers or brands for commercial promotion, is the online influencers' hidden advertisement in this research³⁰.

2.1.3. The Differences Between Traditional Advertisement and Hidden Advertisement

The main purpose of traditional advertising (e.g., television, radio, print, and outdoor) is to build their brands and increase sales³¹, and traditional advertisement still has a key role to play in attracting customers³². The traditional advertisement is easier to know when the public is watching a TV program and the advertisement

²⁸ See Appendix 1.

²⁹ Xue, Minzhi. 2007. "植入式广告的国际运营及国内发展趋势(International Operation And Domestic Development Trend Of Product Placement)". 中国广告(China Advertising) 2007(9):6. doi:CNKI:SUN:GGGG.0.2007-09-034. (Chinese language, translation by the author).

³⁰ Countries and regions have similar nouns for hidden advertisement, but they all refer to the online influencers' advertising that deliberately conceals the fact of sponsorship as described in this article. It may be called "暗广 àn guǎng" in China; "surreptitious advertising" in the EU; and "hidden advertisement" in the U.K.

³¹ de Vries, Lisette, Sonja Gensler, and Peter S.H. Leeflang. 2017. "Effects of Traditional Advertising and Social Messages on Brand-Building Metrics and Customer Acquisition". *Journal Of Marketing* 81 (5): 1. doi:10.1509/jm.15.0178.

³² Lesonsky, Rieva. 2017. "Why Traditional Advertising Still Matters". U.S. Small Business Administration. Available at <https://www.sba.gov/blog/why-traditional-advertising-still-matters>. (Accessed 22/5/2022).

comes out, the public can know the advertisement is out of the program itself directly. Nevertheless, hidden advertising is usually mixed in much information, which is far less direct and clear than a traditional advertisement. When the audience views the hidden advertisement, they may also wonder if it is an advertisement. A study shows that consumers don't like online advertising that prevents them from doing what they want - reading an article, browsing a website, or watching a video. Perhaps traditional advertisement looks more appealing because they are also more controllable³³.

Different from the above-mentioned traditional advertisement, hidden advertisement is mainly spread through online social media, and they rely on the influencer, individual or group, to publish. In traditional advertising, the medium of influencer is missing or bigger. Although in traditional advertising, advertisers will also require celebrities to endorse products, in the analysis, there is still a difference between celebrities and influencers. Celebrities mainly refer to singers, actors, etc., but influencers refer more to famous people with limitations, just like the channel classification of YouTube, they are divided into gaming, Cooking & Health, Beauty & Fashion, and so on³⁴. So hidden advertisement will rely more on influencers' influence in a particular field to make a difference. From the word "hidden", there is a difference between online influencers' hidden advertisement and other online advertisements, hidden advertisement has a commercial purpose by deliberately concealing information or misleading consumers.

³³ Ibid.

³⁴ See Appendix 2.

2.1.4. An Introduction to the Model of Influencer Marketing

Influencer marketing involves a brand collaborating with an online influencer to market one of its products or services. In other words, this is a marketing to influencers. Advertisers or brands may directly contact the influencer or via Multi-Channel Network (hereinafter, "MCN")³⁵, showing the intention of cooperation. Advertisers or brands would determine their Key Performance Indicator (hereinafter, "KPI")³⁶, whether they want to stimulate sales or increase brand awareness. After the preparation, the influencer will organically create specific advertising videos or other posts according to the requirements of the advertiser or the brand and post them on the influencer's social platform usually. Through the publishing of the influencer, the audience relies on the previous engagement and trust to pay attention to the advertisement posts published by the influencer. The process of publishing promotion information through influencers is probably like this. The influencer market is not just about finding a person online with attention, providing influencers with money or exposure so they can provide positive comments about a particular product. As a matter of fact, influencers may consider whether the product or service is suitable for

³⁵ The term "multi-channel network (MCN)" was coined by former YouTube employee and Next New Networks co-founder Jed Simmons. The Multi-Channel Network name was chosen for those who actively managed AND programmed channels to emulate cable TV programming companies such as Turner, Discovery, Disney, Comcast, and MTV Networks that owned and operated multiple channels ("multi-channel"). The MCN name was born within YouTube and its ecosystem. To give another example, we understand content creators as stars or celebrities, then MCN agencies are agents, stars or celebrities are only responsible for content creation, as for how to promote the works created by stars, which is the duty of the agent. Because they have the energy, funds, resources, and experience, MCNs can give more space for content creation and allow the produced content to have more opportunities to be known to the public.

³⁶ A performance indicator or key performance indicator (KPI) is a type of performance measurement. KPIs evaluate the success of an organization or of a particular activity (such as projects, programs, products and other initiatives) in which it engages.

its professional field³⁷ and view the quality of the product to measure whether they are good enough to promote. The process of viewing is also a two-way selection process. Influencers can accumulate a certain number of followers because they cultivate their audience with their hearts and spend energy to build their reputation and so on.

Moreover, the effect of the influencer market is not necessarily immediate, because the influence of the influencer as a medium is still limited to some fields. For advertisers and the brand, gaining loyal and engaged followers with the help of influencer marketing may also be a long process. Nevertheless, still different from traditional advertising, influencer advertising can rely on the breadth of social media to publish posts more and further, and depending on the influencer's follower engagement, this spread will not be shallow, and it may be more effective.

Influencer marketing is expected to grow to be worth \$16.4 billion in 2022³⁸³⁹. Businesses make \$5.78 ROI (Return on Investment) for every \$1 spent on influencer marketing⁴⁰. These moving data all show the attractive advantages of influencer marketing. Companies see influencer marketing as their way forward, with 62% of respondents saying they already planned to increase their influencer marketing budget in 2021. Moreover, just 7% of companies announced they would reduce their

³⁷ Chopra, Anjali, Vrushali Avhad, and Sonali Jaju. 2020. "Influencer Marketing: An Exploratory Study to Identify Antecedents of Consumer Behavior of Millennial". *Business Perspectives and Research* 9 (1): 77-91. doi:10.1177/2278533720923486.

³⁸ Geysler, Werner. 2022. "The State of Influencer Marketing 2022: Benchmark Report". Influencer Marketing Hub. Available at <https://influencermarketinghub.com/influencer-marketing-benchmark-report/>. (Accessed 21/5/2022).

³⁹ See Appendix 3.

⁴⁰ Geysler, Werner. 2022. "What Is Influencer Marketing? - The Ultimate Guide For 2022". Influencer Marketing Hub. Available at <https://influencermarketinghub.com/influencer-marketing/#toc-0>. (Accessed 22/5/2022).

influencer marketing budget or stay away from it⁴¹. Considering that people are increasingly inseparable from social media and its high returns, advertisers or brands are investing more and more in influencer marketing.

Regarding hidden advertising in influencer marketing, there is one concept that must be mentioned: stealth marketing. The definition of stealth marketing is using surreptitious marketing practices that fail to disclose or reveal the true relationship with the company that produces or sponsors the marketing message⁴².

From the definition of stealth marketing, hidden advertising in influencer marketing is also within this scope. Nevertheless, in fact, the scope of stealth marketing is much larger than the topic of online influencers' hidden advertising⁴³. There are roughly six main types of these marketing techniques: viral marketing; brand pushers; celebrity marketing; bait-and-tease marketing; marketing in video games; and marketing in pop and rap music⁴⁴.

In fact, hidden advertising in influencer marketing can be considered as one of the ways of stealth marketing. However, online influencers' hidden advertising is mainly positioned on social media, and the main actors are influencers. The definition and scope of influencer marketing and hidden advertisement can prove this view.

⁴¹ Ibid.

⁴² Martin, Kelly D., and N. Craig Smith. 2008. "Commercializing Social Interaction: The Ethics of Stealth Marketing". *Journal Of Public Policy & Marketing* 27 (1): 45. doi:10.1509/jppm.27.1.45.

⁴³ Kaikati, Andrew M., and Jack G. Kaikati. 2004. "Stealth Marketing: How to Reach Consumers Surreptitiously". *California Management Review* 46 (4): 6-22. doi:10.2307/41166272.

⁴⁴ Ibid.

Nevertheless, in stealth marketing the marketers are not only online influencers, but also include ordinary people who are employed⁴⁵.

Since the inclusion relation between stealth marketing and online influencers' hidden advertising, to better explain the legal issues and analyze various laws and regulations, the scope of this study is only limited to online influencers' hidden advertising.

2.2. Main Features of Hidden Advertisement

2.2.1. Deceptive and Misleading: Not Easy to Detect

From the above description of hidden advertisement, the nature of hidden advertising can arguably be concluded as misleading and deceptive. The operation of online influencers' hidden advertisement shows the intention of concealing the promotion fact and commercial connection between influencers and advertisers or brands. From advertisers or brands to social media platforms, the operation of hidden advertisement could be systematic concealment from top to bottom. As recipients of information, audiences rarely have the resources or energy to understand whether a post is a real advertisement, because they use social media more for relaxation and leisure. The intentional concealment of commercial intent between influencers and advertisers or brands will not be indicated by the words such as "advertising", "sponsorship" and "paid" on social media. Thus, influencers' endorsement and

⁴⁵ In the article "Stealth Marketing: How to Reach Consumers Surreptitiously", written by Kaikati, Andrew M., and Jack G. Kaikati, the article introduced an example of stealth marketing, which is the brand company(Sony) would have the hired person pretend to be a couple and then have them use the phone to take pictures in occasions such as bars or popular tourist spots and recommend the phone brand to the unsuspecting crowd around them. Their aim is to attract unsuspecting tourists and get people to discover the cell phone product through such scenarios.

promotion mislead the audience that these products appear private and reliable, ignoring the fact that they are misled and deceived that what they views is actually an advertisement. Although there are already influencers on platforms such as YouTube and Instagram who will honestly say "this is an advertisement" or with the hashtag "ad", this is also based on the volunteer from the influencers and advertisers or brands. If influencers do not disclose their commercial intentions with advertisers or brands, it is rare to see news about influencers and advertisers or brands being penalized.

2.2.2. The Breadth of Publishing

Nowadays, information is exploding, and the convenience of obtaining information makes the transmission of information faster and more extensive. A study shows that, to the daily time spent on TikTok, users spend an average of 52 minutes per day on the app⁴⁶. It is possible that a short video can be received by many audiences. Although the author mentioned that the influence of influencers might be local and niche, the audience engagement is also why advertisers favor influencer marketing. Influencers publish their views or posts on social media for their existing followers and potential audiences. Due to social media applications such as TikTok will recommend videos posted by users to the "For You" page, which will show users short videos or photos even if the post is not the individual or groups audiences follow⁴⁷. This is why the post's audience is not limited to the influencer's followers but the general public. Then, based on the popularity of applications such as TikTok, a post may not only spread on its own territory, but also gain attention worldwide. Thus, posts on social media can potentially be followed by many audiences, and posts

⁴⁶ Business of Apps. 2022. "TikTok Revenue and Usage Statistics (2022)". Available at <https://www.businessofapps.com/data/tik-tok-statistics/>. (Accessed 21/5/2022).

⁴⁷ See Appendix 4.

from influencers can also be spread far and wide. Similarly, this means that the spread of hidden advertisement may also be farther, and many potential audiences may be affected by hidden advertisement.

2.3. Concerns Regarding Hidden Advertisement

2.3.1. Why Does Hidden Advertisement Appear?

Existing research examining the effects of sponsorship disclosure on viewers' brand attitudes in the context of traditional media⁴⁸ and online contexts⁴⁹ has largely shown that disclosure affects communication outcomes negatively, such as consumers' attitudes toward the sponsored brand. Moreover, disclosures can directly lead to recognition of advertising and consequently influence critical feelings toward the advertising⁵⁰. Therefore, it seems that the way to solve the audience's distrust of the brand is not to disclose it. In this way, there will be no influence on the audience's attitude and impression of the product or service. This also explains why advertisers or brands choose the form of hidden advertising, in order to avoid the negative impact of disclosure advertising on products or brands.

Additionally, it has been argued that advertisement targeted at unknown groups are more effective than the disclosed ones⁵¹. Moreover, taking the TikTok(抖音

⁴⁸ Boerman, Sophie C., Eva A. van Reijmersdal, and Peter C. Neijens. 2012. "Sponsorship Disclosure: Effects of Duration on Persuasion Knowledge And Brand Responses". *Journal Of Communication* 62 (6): 1047-1064. doi:10.1111/j.1460-2466.2012.01677.x.

⁴⁹ See Footnote 26 above.

⁵⁰ See Footnote 48 above.

⁵¹ Ridout, Travis N., Michael M. Franz, and Erika Franklin Fowler. 2014. "Sponsorship, Disclosure, And Donors". *Political Research Quarterly* 68 (1): 154-166. doi:10.1177/1065912914563545.

Douyin) in China as an example⁵², an influencer with more than 10 million followers, the quotation for a 1-20 second video advertisement ranges from 200,000 to 800,000 yuan (approximately 28,000 - 112,000 USD; 1,000,000 – 4,000,000 Baht); an influencer with several followers between 5 million and 10 million, the price of the same type of video advertisement is between 100,000 and 600,000 yuan (approximately 14,000 - 84,000 USD; 500,000 – 3,000,000 Baht); even if the number of followers is less than 100,000, their same type of advertisement price can be as high as 50,000 yuan (approximately 7,000 USD; 250,000 Baht)⁵³. In the contact between influencers and advertisers or brands, the advertising payment of hidden advertisement will be higher than the ordinary advertisement, and some advertisers or brands will clearly tell influencers not to disclose the commercial intentions behind the hidden advertisement⁵⁴. Under the dual role of money and employer requirements, it is not difficult to understand why influencers post hidden advertisement.

Some influencers will choose to use the form of hidden advertisement considering that the quality of the products or services to be promoted is not ideal, so as to avoid the impact on their reputation and profession when they endorse sponsored products or services. Therefore, either it is from the consideration of advertising effects by advertisers or brands, or the consideration of influencers for their own reputation management and financial returns, that concealing the commercial

⁵² See Appendix 5.

⁵³ These data can be queried on a website called " 博主直选(direct selection of influencers)", which displays online influencers' advertising offers including Douyin(Chinese TikTok), Weibo (Sina Weibo), Bilibili, and other mainstream social media platforms in China. Plus, this website will also classify influencers according to their main operating directions, including but not limited to beauty, education, food, sports, and fitness. For details, see <http://kol.shanghainb.com/> (Accessed 9/6/2022).

⁵⁴ This phenomenon can be found on the website of chinanew.com. This news mainly reports about some chaos of influencer marketing and some information related to hidden advertisement. For details, see <https://www.chinanews.com.cn/sh/2021/11-10/9606543.shtml> (Accessed 9/6/2022).

intention behind hidden advertisement has become beneficial to both influencers and advertiser or brands.

The reasons for the emergence of hidden advertising also include the fact that the current law does not provide for mandatory detailed regulations on hidden advertising. For example, while the Federal Trade Commission (hereinafter, "the FTC") in the U.S. is already forcing influencers to disclose a sponsored commercial intent by using clear language to indicate that it is an advertisement⁵⁵. However, returning to influencer marketing in other countries, such as China, under the existing legal regulatory system, there are no clear consumer protection laws or regulations prohibiting the appearance of the hidden advertisement, but it can be aimed at "false and misleading advertisement" to govern. China's existing advertising law now does have regulations for online advertising but lacks the special regulation under hidden advertisement⁵⁶. The search of existing judgment documents in China shows that there is no case about hidden advertisement⁵⁷. Therefore, even if one day, like Han Hye-yeon, she was exposed to using hidden advertising to make huge profits, as an influencer, she did not

55 For more information, could visit the FTC's official website, which not only has articles about social media influencers' disclosure requirements- "Disclosures 101 for Social Media Influencers" but also articles about influencer marketing. For details, visit <https://www.ftc.gov/>. (Accessed 9/6/2022). Or see the following discussion on Part 3.1. of Chapter 3.

56 Wang, Qing, and Yilin Tian. 2020. "网红隐性广告透明化规制：必要性、规制模式与标准(Regulation on Influencer' s Surreptitious Advertising: Necessity, Model and Criteria)". *Publishing Journal* 2020,28(02). doi: 10.13363/j.publishingjournal.2020.02.011. (Chinese language, translation by the author).

57 China Judgment Online (中国裁判文书网) is a unified judgment document disclosure platform established by the Supreme Court of the People's Republic of China in 2013. It is also one of the three major platforms for judicial disclosure (including judicial process disclosure, judgment document disclosure, and enforcement information disclosure). As of August 17, 2022, the author has searched the cases about hidden advertisement in China Judgment Online, and the results show that there are no relevant cases. For more information see <https://wenshu.court.gov.cn/> (Accessed 17/8/2022).

receive any direct punishment from the law⁵⁸. After the storm, she could still appear on social media and post other videos or photos⁵⁹. As time passes, everything is slowly overwhelmed by other thrilling news, and the public seems to be able to forget what influencers have done. Considering the low-risk and high-reward operation mode of online influencers' hidden advertising, it is difficult for influencers and advertiser or brands as the actual publishers of hidden advertisement not to be moved. As potential consumers on social media⁶⁰, audiences do not know how to protect their rights as consumers when these online influencers' hidden advertising appears. These reasons explain why hidden advertisement appears on the social media.

2.3.2. The Necessity of Regulating Hidden Advertisement

The necessity of regulation has much to do with the ease in which one can become an influencer. Since anyone can become an influencer, and once their work spreads, whether it is good or bad, it may have significant impact and influence. Nevertheless, it also leads to the question, why is the audience motivated by advertising to buy products or services? Or why do consumers buy products because of the influencers' recommendations?

⁵⁸ See Footnote 21 above.

⁵⁹ After the hidden advertisement storm in 2020, Han Hye-yeon's YouTube channel has no previous works. Judging from her YouTube homepage, the oldest video was released on August 26, 2021. What's more noteworthy is that she even deleted the previous apology video. For details, visit <https://www.youtube.com/c/%EC%8A%88%EC%8A%A4%EC%8A%A4TV/videos> (Accessed 9/6/2022).

⁶⁰ Chen, Beilei. 2008. "基于网络和信任理论的消费者在线口碑传播实证研究 (An Empirical Study of Consumer Online Word-Of-Mouth Communication Based on Network and Trust Theory)". Ph.D., 浙江大学 (Zhejiang University) . (Chinese language, translation by the author).

2.3.2.1. Unique Selling Proposition Theory

Rosser Reeves proposed the unique selling proposition theory (hereinafter, "the USP theory"), which requires that a " unique selling proposition " be showed to consumers⁶¹. The theory states that advertisement not only relies on words or images but also suggests to consumers the clear benefits that can be obtained by purchasing the product⁶². First, an advertisement must clearly sell a proposition to consumers; second, the proposition must be unique or one that has not been made or presented by other similar product advertisements; and third, the proposition must be powerful to consumers⁶³. Under the influence of the influencer, the clear benefit from the USP theory may become the influencers themselves, such as having the same healthy lifestyle, the same fitted body, or pretty face. In other words, influencers themselves will be productized and will form a product with distinct personal characteristics.

Taking a Chinese top influencer Li Ziqi as an example, the video uploaded by Li Ziqi is mainly divided into two parts: antique food and antique craft⁶⁴. The former mainly shares the process of making food by Chinese traditional cooking methods, while the latter mainly shows the process of making rouge, dyeing, and making clothes, and the Four Treasures of the Study⁶⁵ by traditional methods. Her videos are not mainly for teaching purposes, but there are many scenes showing the natural

⁶¹ Reeves, Rosser. 1961. Reality in Advertising. Knopf. Available at <https://jonduke.files.wordpress.com/2018/10/reality-in-advertising.pdf> (Accessed 21/5/2022).

⁶² Ibid., p.44.

⁶³ Ibid., p.44.

⁶⁴ See Appendix 6.

⁶⁵ The Four Treasures of the Study is a general term for a set of tools for painting and writing in ancient China, namely paper, ink, brush pen, and inkstone. The quality of the Four Treasures of the Study plays a decisive role in one's painting and calligraphy.

scenery of the countryside in mainland China⁶⁶. According to the USP theory, Li Ziqi's " unique selling proposition " as an influencer is the spiritual yearning and sustenance of urban people for a peaceful life in the countryside. As of May 9, 2022, her subscriptions on YouTube have exceeded 16.9 million, and her followers on the Chinese version of TikTok have exceeded 52.8 million⁶⁷.

2.3.2.2. Herd Behaviors and Herding

The mechanism for herding involves conscious, deliberate, and controlled psychological processes⁶⁸. Herd behaviors may be labeled docility or receptivity to social norms⁶⁹. In other words, the concept of herding is to rely on others for suggestions, recommendations, persuasion, and information obtained through social channels as a major basis of choice⁷⁰. The daily routine of influencers on social media is to post their views or opinions. Their words and actions will be seen and heard by the audience. When the influencers are advertising, the persuasive expressions of the influencers will also affect the audience's choice. In particular, these personal opinions or advice are more easily accepted when they come from people you know or trust⁷¹.

⁶⁶ For more videos and presentations of Li Ziqi, visit <https://www.youtube.com/c/cnliziqi/featured> (Accessed 9/6/2022).

⁶⁷ See Appendix 6 and Appendix 7.

⁶⁸ Kameda, Tatsuya, and Reid Hastie, "Herd Behavior" in *Emerging Trends in the Social and Behavioral Sciences* (John Wiley & Sons, Incorporated, 2015), 5.

⁶⁹ Simon, Herbert A. 1990. "A Mechanism for Social Selection and Successful Altruism". *Science* 250 (4988): 1665-1668. doi:10.1126/science.2270480.

⁷⁰ Ibid.

⁷¹ Sinha, Rashmi, and Kirsten Swearingen. 2001. "Comparing Recommendations Made by Online Systems and Friends". Available at <https://www.ercim.eu/publication/ws-proceedings/DelNoe02/RashmiSinha.pdf> (Accessed 21/5/2022).

Another point worth thinking about is that in the article "Herd Behavior in Consumers' Adoption of Online Reviews" written by Xiao-Liang Shen, Kem Z.K. Zhang, and Sesia J. Zhao, shows that online reviews also affect the audience's consumption choices⁷². This also corresponds to our previous point of view on influencers - influence and follower engagement. Followers comment or subscribe to influencers' videos, which will reflect the popularity of influencers. For the recommendation of influencers, it is because of herding that followers will show a positive perception⁷³⁷⁴. That's why when influencers are recommending in videos, the public can find followers commenting that they want the same product or service.

The above two theories both explain why the public pays attention to influencers' videos and why the audiences are recommended by influencers to change their consumption choices. Under such a foreshadowing, it is not difficult to understand why it is necessary to regulate influencers' hidden advertisement. This is particularly because the endorsement of influencers will affect the consumption choices of the audience, especially when the influencers have a positive promotion of the product or service.

⁷² Shen, Xiao-Liang, Kem Z.K. Zhang, and Sesia J. Zhao. 2015. "Herd Behavior in Consumers' Adoption of Online Reviews". *Journal of the Association for Information Science and Technology* 67 (11): 2754-2765. doi:10.1002/asi.23602.

⁷³ Chen, Haiyun. 2021. "从众效应理论视角下网红营销对游客感知目的地形象的影响研究(From the Perspective of Herd Behavior, Research On The Influence Of Online Influencer Marketing On Tourists' Perception Of Destination Image)". *旅游纵览(Tourism Overview)* 2021 (19): 5-7. (Chinese language, translation by the author).

⁷⁴ The article by Chen Haiyun, "From the Perspective of Herd Behavior, Research on the Influence of Online Influencer Marketing on Tourists' Perception of Destination Image" is based on Herd Behaviors, the article conducts statistics, classification, and analysis of the number of comments by searching and filtering videos in the short video platform. The paper screened and counted 13,185 comments in 12 short videos and selected 726 valid comments for analysis. The research results show that through online influencer marketing, tourists' positive perception of the destination image is as high as 71.2%, and the neutral image perception of the destination reaches 27%. Tourists are more likely to be influenced by herd behaviors and visit an internet-famous tourist destination.

Historically, although the "consumer movements" aimed at protecting the rights and interests of consumers originated in northern England in the late 19th century, and the Federal Trade Commission (hereinafter, "the FTC") was established in 1899, the legislation to protect the rights and interests of consumers began to be valued by all countries in the 1960s⁷⁵. Moreover, the rise of consumer protection has certain relationship with the promotion of John Kennedy. On March 15, 1962, Kennedy delivered "Special Message to Congress on Protecting Consumer Interest". At the beginning of the speech, he said: "all of us are consumers. All of us deserve the right to be protected against the fraudulent or misleading advertisement and labels"⁷⁶. Kennedy then mentioned consumer rights, including the right to know. His speech is regarded by scholars as to the "Consumer Rights Act"⁷⁷, and it has also become an important driver for the confirmation of consumer rights by legislation.

The existing FTC publication "Disclosures 101 For Social Media Influencers" guides how influencers are doing disclosure on social media⁷⁸. The main goal of the FTC regulatory guidelines for social media sponsorship is to ensure the recognition of advertising⁷⁹. Therefore, advertisements that are not identifiable are prohibited. For example, the European Union's television broadcasting act directive in 1989 explicitly

⁷⁵ See Footnote 56 above.

⁷⁶ Kennedy, John. 1962. "Special Message to Congress on Protecting Consumer Interest". Jfklibrary.Org. Available at <https://www.jfklibrary.org/asset-viewer/archives/JFKPOF/037/JFKPOF-037-028>. (Accessed 22/5/2022).

⁷⁷ Caner, Dincer, and Dincer Banu. 2014. "An Overview and Analysis of Marketing Ethics". International Journal of Academic Research in Business And Social Sciences 4 (11). doi:10.6007/ijarbss/v4-i11/1290.

⁷⁸ Federal Trade Commission. 2019. "Disclosures 101 For Social Media Influencers". Available at <https://www.ftc.gov/business-guidance/resources/disclosures-101-social-media-influencers>. (Accessed 22/5/2022).

⁷⁹ Federal Trade Commission. 2013. ".Com Disclosures: How To Make Effective Disclosures In Digital Advertising". Available at <https://www.ftc.gov/business-guidance/resources/com-disclosures-how-make-effective-disclosures-digital-advertising>. (Accessed 22/5/2022).

prohibits hidden advertising, namely "surreptitious advertising"⁸⁰. The aforementioned Han Hye-yeon was also reported to be sued together with 4 advertisers in 2020⁸¹. The relevant lawyer explained that: Youtuber endorsed the product without disclosing her financial interests to the advertisers and issued a statement saying that she paid and purchased this product, which constitutes deliberately deceiving. "Given that the deception was revealed through videos etc. and Han Hye-yeon also admitted her actions, it is highly possible to prove the deception," and "Given the reality that YouTubers exert enormous influence, I think it is quite possible for the court to admit mental damage."⁸²

A large number of examples in real practice show that the phenomenon of hidden advertisement is not only in one jurisdiction. Nevertheless, organizational institutions also play legal and industry self-regulatory roles in regulating online influencers' hidden advertisement. However, there are also jurisdictions such as China, which have very few related laws or guidance in this field, even though there is no industry self-regulation at all⁸³. Therefore, combined with the above arguments on the impact of hidden advertisement on consumers' consumption decisions, it is necessary to regulate hidden advertisement to avoid the false and misleading.

⁸⁰ See Footnote 56 above.

⁸¹ See Footnote 21 above.

⁸² Details about this news can be found on the website: <https://www.dispatch.co.kr/2108233>. (Accessed 9/6/2022).

⁸³ See Footnote 56 above, p.76.

2.3.3. Important Issues for Consideration When Regulating Hidden Advertisement

In the actual operation of the influencer market, the publishing of a hidden advertisement may not only involve the advertiser and the influencer. It may also include the brand company, advertising company, the MCN⁸⁴, influencers, etc. Given the gradual development and expansion of the influencer market, the business model and operation are also more detailed. Then once the hidden advertisement is exposed and discovered, there are many bodies that can be the subject of liability. Taking China as an example, when regulating advertising legal issues, Chinese laws already have a set of relatively complete and detailed laws and regulations for traditional advertising issues, which require advertisements that violate the law to bear civil or even criminal liability⁸⁵. However, considering the particularity of online influencers' hidden advertisement, it is difficult for the public to find specific legal liabilities and the subjects of the liability under the existing legal system.

When proving influencers' hidden advertising, it is difficult to obtain evidence when the commercial relationship between influencers and advertisers or brands is deliberately concealed or misled. Therefore, the burden of proof will increase the difficulty of action for the victim or the law enforcement agency⁸⁶. That's why the FTC requires influencers to voluntarily post a video, photo, or text with a prominent

⁸⁴ See Footnote 35 above.

⁸⁵ Wang, Fang. 2016. "微博名人隐性商业言论的法律规制研究(Legal Regulation Questions Of Blog-Celebrity Recessive Commercial Speech)". Post-Graduate, 南昌大学 Nanchang University. (Chinese language, translation by the author).

⁸⁶ Arayess, Sarah, and Dominique Geerts. 2017. "The Netherlands · Social Media Advertising: How to Engage and Comply". *European Food and Feed Law Review (EFFL)* 12 (6): 530.

mark to indicate that this is an advertisement⁸⁷. Mandatory disclosure will save the trouble of determining the responsible subject and the burden of proof from the source in ex-post regulation. Improving the transparency of business relationships disclosure between influencers and advertisers has also been advocated by the FTC. In its "Guides Concerning the Use of Endorsements and Testimonials in Advertising"⁸⁸ and "Disclosures 101 for Social Media Influencers"⁸⁹, the FTC clearly states that the FTC Act's prohibition on unfair or deceptive marketing practices or practices applies to all forms of marketing, regardless of the medium⁹⁰. These regulations and guidance documents regarding the FTC are discussed in more detail in Chapter 3.

In order to study how to regulate influencers, advertisers, brands, and even platforms' legal liabilities and the legality of regulatory behavior, many platforms are global, so the scope of this issue involves not only the domestic laws of each country but also may be a global governance. As a social media platform, it is also recommended to advocate influencers to improve transparency with advertisers, through the hashtags "#ad", "#sponsor" and so on. Taking TikTok as an example, it has "Community Guidelines" in its application, which advocates "integrity and authenticity". TikTok will "remove content or accounts that involve spam or fake engagement, impersonation, or misleading information that causes significant harm." Nevertheless, "Community Guidelines", after all, is not the "law". This type of rule is more like the self-regulation. Transparency has always been an important part of

⁸⁷ See Footnotes 79 above.

⁸⁸ Federal Trade Commission. 2009. "Guides Concerning the Use of Endorsements and Testimonials in Advertising". Available at <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-publishes-final-guides-governing-endorsements-testimonials/091005revisedendorsementguides.pdf>. (Accessed 22/5/2022).

⁸⁹ See Footnote 78 above.

⁹⁰ See Footnote 79 above.

governance⁹¹. Thus, the transparency of disclosing commercial intent in hidden advertising is also vital. For instance, TikTok is a cross-regional social media platform, its "Creating Branded Content on TikTok" requires influencers to disclose commercial connections with advertisers to audiences⁹². If the relevant posts published by influencers fail to pass the review of TikTok, they may be removed from the application. This self-regulation mandates the disclosure of influencers and the commercial relationship of advertisers or brands, which will improve the transparency between the two and will also facilitate the regulation of hidden advertisement by social media platforms.

The concept of influencers and the operation of hidden advertising showcase the complex and thriving nature of influencer marketing. Although there is still little literature on the regulation of hidden advertising, it does not mean that this issue is not important, rather hidden advertising involves many legal aspects.

However, due to the complex nature of online hidden advertising, and the special nature of the multiple parties involved, in order to reduce the emergence of online influencers' hidden advertising, a single domestic law may not be ideal. It follows that a regulatory framework that can be applied to most cases and protect the legal rights of consumers is necessary. This is the universal regulatory framework that this study hopes to conclude after comparing and analyzing the laws and regulations of major jurisdictions. Considering the inconsistency and diversity of judicial systems in different countries and regions, the detailed rules for online influencers' hidden advertisement could be difficult. Nevertheless, it is possible to propose a universal

⁹¹ Hale, Thomas N. 2008. "Transparency, Accountability, And Global Governance". *Global Governance: A Review of Multilateralism and International Organizations* 14 (1): 74. doi:10.1163/19426720-01401006.

⁹² TikTok. "Creating Branded Content on TikTok". Available at <https://www.tiktok.com/creators/creator-portal/en-us/getting-paid-to-create/creating-branded-content-on-tiktok/>. (Accessed 22/5/2022).

regulatory framework that can contribute to solving the problems arising from online influencers' hidden advertisement.



Chapter.3 The Legal Frameworks Relating to Online Influencers' Advertisement from Comparative Perspectives

Resistance to hidden advertising is evident in most countries, and the need for regulation of online hidden advertising have been discussed in the previous sections. In practice, the specific implementation of each country is not consistent, which also reflects the inconsistent differences in the development of the regulatory framework of each country and region.

This chapter examines the relevant laws, regulations, and guidance documents for hidden advertisement in major countries and regions: the United States, the United Kingdom, the European Union, Canada, the Association of Southeast Asian Nations, and China. Although there exist few directly applicable regulatory frameworks on the hidden advertisement and self-regulation is also lacking in some countries, the general consumer protection law may be relevant to the issues of online hidden advertisement, through the application of the provision of prohibiting the false and misleading advertising.

Therefore, the focus of the analysis in this chapter falls upon those jurisdictions that have detailed regulations or guidance documents for online influencers' hidden advertisement. For those countries or regions that do not have specific guidance documents, the emphasis is shifted slightly towards the parts of their domestic laws that correspond to the consumer protection laws of the false and misleading advertisement.

3.1. The United States (the U.S.)

3.1.1. A Brief Introduction to the Legal System of the U.S.

In the United States, there are five major sources of law: constitutional law, statutory law, treaties, administrative regulations, and common law (which includes case law)⁹³. The nation's Constitution is described as occupying a central place in the thinking of the people⁹⁴, as well as various civil liberties⁹⁵. Moreover, the Constitution sets out the boundaries of federal law, which consists of Acts of Congress⁹⁶, treaties ratified by the Senate⁹⁷, regulations promulgated by the executive branch⁹⁸, and case law originating from the federal judiciary⁹⁹.

The Constitution divides the delegated powers of the Federal government into three defined categories: the legislative, executive, and judicial branches. This type of government structure is called the separation of powers. The separation of powers means that each branch of government would confine itself to its assigned responsibility¹⁰⁰. Among those, the executive branch, as the branch of government formed by constitutions mandating the separation of powers, consists of a chief

⁹³ Bergman, Paul, and Sara Berman. 2016. *Represent Yourself in Court: How to Prepare & Try A Winning Case*. 6th ed. NOLO: 481.

⁹⁴ Kallenbach, Joseph E. 1962. "The U.S. Constitution, The Supreme Court And Civil Liberties". *The Indian Journal Of Political Science* 23 (1/4 (January—December, 1962): 107.

⁹⁵ *Ibid.* p.109.

⁹⁶ *Ex Parte Virginia*, 100 U.S. 339 (1879).

⁹⁷ *Head Money Cases*, 112 U.S. 580 (1884).

⁹⁸ *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

⁹⁹ *Cooper v. Aaron*, 358 U.S. 1 (1958).

¹⁰⁰ *INS v. Chadha*, 462 U.S. 919 (1983).

executive, who is the president, and various cabinet departments and agencies that report to the chief executive. Chief executives do not personally enforce all the laws of their jurisdictions. Instead, they delegate the enforcement of different areas of law to different agencies¹⁰¹. Regarding regulations promulgated by the executive branch, the Code of Federal Regulations (hereinafter, "the CFR") is the codification of the general and permanent regulations published in the Federal Register¹⁰² by the executive departments and agencies of the federal government of the United States. Thus, the CFR can be seen as administrative regulation in a broad sense.

The U.S. has multiple levels of laws, which could be confusing for non-U.S. residents. Generally, federal law applies equally throughout the entire United States, while state laws only apply within the borders of that particular state. There are also local laws, which affect only that locality. In general, the Supremacy Clause requires state law to yield to federal law when the state law conflicts with the federal law, and state laws shall not supersede the constitutional rights afforded to all the U.S. citizens under federal law¹⁰³.

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¹⁰¹ Steenken, Beau, and Tina Brooks. 2022. Sources of American Law. Ebook. eLangdell. Available at <https://sourcesofamericanlaw.lawbooks.cali.org/>. (Accessed 29/7/2022).

¹⁰² The Federal Register (FR or sometimes Fed. Reg.) is the official journal of the federal government of the United States that contains government agency rules, proposed rules, and public notices. It is published every weekday, except on federal holidays. The final rules promulgated by a federal agency and published in the Federal Register are ultimately reorganized by topic or subject matter and codified in the Code of Federal Regulations (CFR), which is updated annually.

¹⁰³ U.S. Constitution, Article VI, Clause 2.

3.1.2. The Federal Trade Commission and Related Influencer Marketing Regulations

The U.S. is the largest advertising market in the world¹⁰⁴. In the U.S., the major regulatory body for consumer protection is the Federal Trade Commission (hereinafter, "the FTC"). Therefore, the FTC as a federal agency, when the FTC was created in 1914, Congress passed the Federal Trade Commission Act (hereinafter, "the FTCA")¹⁰⁵, the FTC's purpose was to prevent unfair methods of competition in commerce as part of the battle to "bust the trusts", but as the economy and markets have evolved, the FTC's responsibilities and powers have expanded, and the FTC has been directed to administer a wide variety of other consumer protection laws since 1938¹⁰⁶. In the regulatory arena, the FTC has relied extensively on the promulgation of regulations to guide business behavior, in addition to initiating legal action¹⁰⁷, and the FTC also has been directed to administer a wide variety of other consumer protection laws¹⁰⁸.

According to the FTCA, the FTC is empowered, among other things, to prevent unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce¹⁰⁹; prescribe defining rules with specificity acts or practices that are unfair

¹⁰⁴ Guttman, A. 2022. "Ad Spend in The World's Largest Ad Markets 2021". Statista. Available at <https://www.statista.com/statistics/273736/advertising-expenditure-in-the-worlds-largest-ad-markets/>. (Accessed 1/6/2022).

¹⁰⁵ 15 U.S. Code Chapter 2 Subchapter I FEDERAL TRADE COMMISSION.

¹⁰⁶ Federal Trade Commission. "About The FTC". Available at <https://www.ftc.gov/about-ftc>. (Accessed 1/6/2022).

¹⁰⁷ Yu, Ping. 2019. "美国广告规制研究(The Research of Advertising Regulation in the United States)". Ph.D., 上海大学 (Shanghai University). (Chinese language, translation by the author).

¹⁰⁸ See Footnote 103 above.

¹⁰⁹ 15 U.S. Code § 45 and §55.

or deceptive, and establishing requirements designed to prevent such acts or practices¹¹⁰; gather and compile information and conduct investigations relating to the organization, business, practices, and management of entities engaged in commerce; seek monetary redress and other relief for conduct injurious to consumers¹¹¹. However, in 1973, in *National Petroleum Refiners Association v. FTC*, the District Court for the District of Columbia held that the FTC lacks the statutory authority of rulemaking¹¹². The same year, a few scholars question FTC's substantive rulemaking authority¹¹³. In 1975, the amendments of 15 U.S. Code § 57a became the FTC's exclusive authority for issuing rules concerning unfair or deceptive acts or practices under the 15 U.S. Code § 57a(a)(2), and 15 U.S. Code § 46 continues to authorize rules concerning unfair methods of competition. Hence, the amendments of the FTCA have created why the FTC may use trade regulation rules to address unfair or deceptive practices nowadays¹¹⁴.

In this section, the author will examine the guidance documents and rules issued by the FTC again in greater detail, to discuss the principal rules and priorities behind the issuance of these documents by the FTC.

For online influencers' hidden advertisement, two main guidance documents show the FTC's attitude and direction on the regulation of hidden advertising issues,

¹¹⁰ 15 U.S. Code § 57a

¹¹¹ 15 U.S. Code § 45(e) (1)

¹¹² *National Petroleum Refiners Association v. FTC*, 340 F. Supp. 1343 (D.D.C. 1972). Available at <https://law.justia.com/cases/federal/district-courts/FSupp/340/1343/1445413/>. (Accessed 13/8/2022).

¹¹³ "FTC Substantive Rulemaking Authority". 1974. *Duke Law Journal* 1974 (2): 297. doi:10.2307/1371922.

¹¹⁴ Federal Trade Commission. "A Brief Overview of The Federal Trade Commission's Investigative, Law Enforcement, And Rulemaking Authority". Available at <https://www.ftc.gov/about-ftc/mission/enforcement-authority>. (Accessed 4/8/2022).

which are Disclosures 101 for Social Media Influencers (hereinafter, "the Disclosure 101")¹¹⁵ and .com Disclosures: How to Make Effective Disclosures in Digital Advertising (hereinafter, "the .com Disclosure")¹¹⁶. The Guides Concerning the Use of Endorsements and Testimonials in Advertising (hereinafter, "the Endorsement Guides")¹¹⁷ is the rule for the use of endorsements and testimonials in advertising.

3.1.2.1. Disclosures 101 for Social Media Influencers

"Disclosures 101 for Social Media Influencers" is a guide for influencers on when and how to make good disclosures. The document is only seven pages long, and the overall style is different from that of a legal document, as if a brochure of advice. The entire document can be divided into four parts: the first part generally explains that influencers should be responsible for their own endorsement when they have a "material connection" with the brand; the second part suggests when influencers should disclose the material connection; and the third part suggests how to do so; and the last part suggests three other things that influencers should be aware of. The entire guidance document does not directly cite legal articles or regulations and is a quite short proposal for influencers' social media endorsement practices. Nevertheless, the document still has/offers some signals worthy of attention.

In the first part, the Disclosure 101's first sentence emphasizes that if influencers work with brands to recommend or endorse products, then influencers need to comply with the law when making these recommendations. The Disclosure 101 states that influencers make a good disclosure of their relationship to the brand is the critical

¹¹⁵ See Footnote 78 above.

¹¹⁶ See Footnote 79 above, p.6.

¹¹⁷ See Footnote 88 above.

point. In subsequent paragraphs, the Disclosure 101 emphasizes that when there is a relationship (referred to by the FTC as "material connection") between the influencer and the brand, the influencer should disclose the material relationship between them to the followers when they endorse the brand. A "material connection" to the brand in the Disclosure 101 includes a personal, family, or employment relationship or a financial relationship – such as the brand paying influencers or giving influencers free or discounted products or services¹¹⁸. The definition of material connection actually goes back to 16 CFR § 255.5, which is a part of the Endorsement Guides. In 16 CFR § 255.5, the disclosure of material connection is defined as follows

"When there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (i.e., the connection is not reasonably expected by the audience), such connection must be fully disclosed."¹¹⁹

The material connection is the connection between the endorser and the seller that will affect the weight or credibility of the endorsement, and the connection is not reasonably expected by the audience. The material connection in the Disclosure 101 is a more detailed and specific explanation of the material connection in 16 CFR § 255.5. Material connection in the Disclosure 101 illustrates specific connections that are not reasonably expected by the audience. This means that when influencers receive benefits that may affect the objectivity of their statements, they must disclose the connection between them and the advertiser or brand. The audience's trust in

¹¹⁸ See Footnote 78 above.

¹¹⁹ 16 C.F.R. § 255.5. Disclosure of Material Connections

influencers will have a more positive impact on influencers' recommendations¹²⁰. This impact will affect the audience's consumption choices. Thus, the material connection between influencers and advertisers or brands should serve as a reference for audiences when evaluating the promoted product or service. The disclosure of material connections allows audiences to reasonably assess how credible the endorsers of influencers are, so that the information consumers get from influencers cannot be misled by endorsements.

The FTC has defined the meaning of "material connection" in this document. The scope of material connection is limited to a personal, family, or employment relationship or a financial relationship. Relationships beyond this scope, such as the endorsement of virtual influencers that will be introduced in Part 4.2.2.2. of Chapter 4, and the determination of whether virtual influencers and the brand can form a material connection, is not explained. Nevertheless, the FTC is still concerned about influencers in the disclosure to be honest and truthful:

*"Telling your followers about these kinds of relationships is important because it helps keep your recommendations honest and truthful, and it allows people to weigh the value of your endorsements."*¹²¹

On the topic of honesty, the Disclosures 101 also guides influencers that if influencers are hired to talk about a product and thought the product was terrible, influencers cannot say it is terrific. Influencers are not free to review products that they have not used¹²². Because these opinions are not based on honest and truthful

¹²⁰ See Footnote 71 above.

¹²¹ See Footnote 78 above, p.2.

¹²² See Footnote 78 above, p.6.

evaluations of influencers and will mislead the audience's evaluation of the products or services, these are specific FTC recommendations to influencers on how to be honest and truthful. Nevertheless, they are only recommendations, with no apparent direct indication that these are legal obligations of influencers.

The FTC also emphasizes in the last paragraph of the first part as follows

"As an influencer, it's your responsibility to make these disclosures, to be familiar with the Endorsement Guides, and to comply with laws against deceptive ads." ¹²³

While this statement suggests that influencers need to do three things: take responsibility for disclosures; be familiar with another document issued by the FTC, "Guides Concerning the Use of Endorsements and Testimonials in Advertising (the Endorsement Guides)"; and comply with laws against deceptive advertising. The legal meaning behind this statement is still vague. Because the document does not indicate whether the responsibilities of influencers are statutory or voluntary, in other words, the FTC is only persuading influencers to do these three things in this document, but it is not clear that influencers will face such legal penalties if they fail to meet the "make a good disclosure" standard. All in all, what is known from the FTC's Disclosures 101 is that as long as the influencers make the disclosures required in Disclosures 101, the legal risk to the influencers will be reduced.

The rest of the part is telling influencers "When to Disclose" and "How to Disclose", all of which are more specific suggestions, such as "make sure people will see and understand the disclosure", and "use simple and clear language". Nevertheless,

¹²³ See Footnote 78 above.

it is not hard to see that the FTC still wants influencers' disclosures to be honest and clear through this document.

3.1.2.2. .com Disclosures: How to Make Effective Disclosures in Digital Advertising

The .com Disclosures: How to Make Effective Disclosures in Digital Advertising (hereinafter, "the .com Disclosure") offers practical recommendations on how to make effective disclosures online¹²⁴. This document can be broadly divided into two topics: the first topic discusses the applicability of the FTC regulations to online advertising; the second topic discusses how to make effective disclosures.

The first part discusses the application of the FTC regulations to online advertising. The reason why the FTC can broadly apply the FTCA's article of the prohibition on "unfair or deceptive acts or practices" to advertising claims, marketing and promotional activities, and sales practices is that the FTCA is not limited to any particular medium¹²⁵. Accordingly, the FTC can protect consumers from unfair or deceptive acts or practices in the field of online advertising. Nevertheless, the FTCA does not explain the definition of "unfair" and "deceptive". Thus, the FTC has issued policy statements outlining the interpretation of "unfairness"¹²⁶ and "deception"¹²⁷. The FTC's interpretation of "unfairness" and "deception" has different views at

¹²⁴ Federal Trade Commission. "Online Advertising and Marketing". Available at <https://www.ftc.gov/business-guidance/advertising-marketing/online-advertising-marketing>. (Accessed 5/8/2022).

¹²⁵ See Footnote 79 above, p.2.

¹²⁶ Federal Trade Commission. "FTC Policy Statement on Unfairness". Available at <https://www.ftc.gov/legal-library/browse/ftc-policy-statement-unfairness>. (Accessed 19/8/2022).

¹²⁷ Federal Trade Commission. "FTC Policy Statement on Deception". Available at https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf. (Accessed 19/8/2022).

different times, but now the FTC's interpretation of "unfair or deceptive acts or practices" is mainly: unlawful, unfair or fraudulent business practices and unfair, deceptive, untrue or misleading advertising¹²⁸. The examination of "unfair or deceptive acts or practices" is based on the perspective of a consumer acting reasonably in the circumstances¹²⁹. This provides that advertising that merely had a tendency or capacity to deceive or mislead the consumer can be identified as unfair or deceptive acts or practices.

The second part can be regarded as the highlight and focus of the entire guidance document. The purpose of the .com Disclosure, as its subtitle says, is to make effective disclosures in digital advertising, then in this part, the FTC puts forward a point of view on "effective disclosures", that is, requiring disclosure to meet "the clear and conspicuous requirement". The clear and conspicuous requirement also aims to prevent an advertisement from being deceptive, unfair, or otherwise violative of the FTC rule¹³⁰. For the specific requirements of the clear and conspicuous requirement, the FTC divides it into six themes¹³¹, explaining what factors are considered in assessing whether a particular disclosure is clear and conspicuous as follows:

"-the placement of the disclosure in the advertisement and its proximity to the claim it is qualifying;

¹²⁸ Rosch, J. Thomas. 2007. Deceptive and Unfair Acts and Practices Principles: Evolution and Convergence. Ebook. Available at <https://www.ftc.gov/news-events/news/speeches/deceptive-unfair-acts-practices-principles-evolution-convergence>. (Accessed 19/8/2022).

¹²⁹ See Footnote 127 above.

¹³⁰ See Footnote 79 above, p.6.

¹³¹ The 6 themes include 1. Proximity and Placement; 2. Prominence; 3. Distracting Factors in Ads; 4. Repetition; 5. Multimedia Messages and Campaigns; and 6. Understandable Language. for more information, see <https://www.ftc.gov/business-guidance/resources/com-disclosures-how-make-effective-disclosures-digital-advertising>. (Accessed 5/8/2022).

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- the prominence of the disclosure;
 - whether the disclosure is unavoidable;
 - the extent to which items in other parts of the advertisement might distract attention from the disclosure;
 - whether the disclosure needs to be repeated several times in order to be effectively communicated, or because consumers may enter the site at different locations or travel through the site on paths that cause them to miss the disclosure;
 - whether disclosures in audio messages are presented in an adequate volume and cadence and visual disclosures appear for a sufficient duration; and
 - whether the language of the disclosure is understandable to the intended audience."¹³²

For these factors, the FTC has also provided detailed examples of specific references under the six themes. However, the FTC also states in this document that the basic principles of advertising law are equally applicable in online advertising, that

- "1. Advertising must be truthful and not misleading;
2. Advertisers must have evidence to back up their claims ("substantiation") and;
3. Advertisements cannot be unfair."¹³³

¹³² See Footnote 79 above, p.7.

Looking back at the .com Disclosure, the topic of the entire document is how to apply the clear and conspicuous requirement to make effective disclosures. Unlike the Disclosure 101, which is for influencers, the .com Disclosure is for advertisers, saying that advertisers are responsible for ensuring that all express and implied claims that an advertisement conveys to reasonable consumers are truthful and substantiated¹³⁴.

Nevertheless, again, this document is not legally binding in the same sense as the Disclosure 101 because of its nature as guide. Nevertheless, the FTC shows another layer of meaning for guides in the .com Disclosure's footnote:

"Guides are 'administrative interpretations of laws administered by the Commission.' 16 C.F.R. § 1.5. Although guides do not have the force and effect of law, if a person or company fails to comply with a guide, the Commission might bring an enforcement action alleging an unfair or deceptive practice in violation of the FTC Act.¹³⁵"

This explanation gives all the guides issued by the FTC on consumer protection a status worthy of attention by influencers, the brand and advertisers. If the recommendations of these guides are not followed, the FTC will apply the FTCA, which is the real law, to file a lawsuit. This explains that the .com Disclosure and the Disclosure 101 are still authoritative and deterrent in the field of online advertising. In the .com Disclosure, the FTC's criterion for "effective disclosures" is whether it meets the "clear and conspicuous" requirement. The

¹³³ See Footnote 79 above, p.4.

¹³⁴ See Footnote 79 above, p.5.

¹³⁵ See Footnote 79 above, p.2.

interpretation of the "clear and conspicuous" requirement in the .com Disclosure is illustrated by numerous examples. Although the .com Disclosure is only a guide, the FTC's interpretation of the "clear and conspicuous" requirement also illustrates the FTC's regulatory attitude and the trend towards online advertising, that is, requiring that advertising be recognizable. Although the .com Disclosure is not a law, the "clear and conspicuous" requirement states that this is an important document for influencers and advertisers or brands to follow. Because when disclosures meet the "clear and conspicuous" requirement, influencers and advertisers or brands could mitigate the risk of becoming an unfair or deceptive practice, and avoid the FTC applying the FTCA to sue them for disclosures that fail to meet the "clear and conspicuous" requirement.

Overall, in the .com Disclosure, there is no set formula for clear and conspicuous disclosure. However, the main objective is to ensure that products and services are described truthfully and that consumers get what they pay for. These constitute the clear and conspicuous requirement that will make the disclosure effective.

3.1.2.3. Guides Concerning the Use of Endorsements and Testimonials in Advertising

The FTC also has a rule involving the hidden advertisement: Guides Concerning the Use of Endorsements and Testimonials in Advertising (hereinafter, "the Endorsement Guides"). Different from the first two guidance documents, the Endorsement Guides is under 16 CFR Part 255. There are a total of 5 articles, which can be roughly divided into three parts: the first part is § 255.0 to § 255.1, which is the background introduction of the Endorsement Guides and the explanation of related concepts; the second part, § 255.2 to § 255.4, deals with consumer

endorsements, expert endorsements, and endorsements by organizations; the third part, § 255.5, explains and exemplifies the "disclosure of material connections".

Although the Endorsement Guides is part of the CFR, 16 CFR § 255.0 (a) states that the FTC may take corrective action under Section 5 of FTCA (15 U.S. Code. § 45) when the FTC finds practices inconsistent with the Endorsement Guides. This shows that the FTC chose the FTCA over the Endorsement Guides when they start an investigation. On the FTC's official website, the FTC refers to the Endorsement Guides as "guidelines"¹³⁶. Moreover, the Endorsement Guides is defined as administrative interpretations of laws administered by the FTC, but the Endorsement Guides don't have the force of law¹³⁷. Therefore, the legal effect and status of the Endorsement Guides are still ambiguous. Although the Endorsement Guides are the CFR, the FTC still shows that the Endorsement Guides only have the function of legal interpretation, not the force of law. This shows that the Endorsement Guides only have a guiding role for influencers and advertisers or brands, but in the actual enforcement of the FTC, the FTC will still choose the FTCA. However, the Endorsement Guides are still important for influencers and advertisers or brands, because as a guide, the FTC indicates that failing to follow these guidelines may lead to the risk of violating Commission rules¹³⁸.

The Endorsement Guides is more general than the two guidance documents analyzed in Parts 3.1.2.1 and 3.1.2.2 of Chapter 3 of this Part. and the Endorsement Guides shows many examples. In this document, it is also stipulated that the material connection between influencers and advertisers or brand companies of commercial

¹³⁶ Federal Trade Commission. "Advertisement Endorsements". Available at <https://www.ftc.gov/news-events/topics/truth-advertising/advertisement-endorsements>. (Accessed 5/8/2022).

¹³⁷ See Footnote 79 above, p.2.

¹³⁸ See Footnote 79 above, p.2.

intent must be shown to consumers clearly and conspicuously¹³⁹, and that advertisers are subject to liability for failing to disclose, because the material connection may not be reasonably expected by the audience and the material connection will affect the weight or credibility of the endorsement¹⁴⁰.

Although the Endorsement Guides provide numerous examples of how to achieve the requirements of "clear and conspicuous", some scholars are concerned about its lack of specificity, and also doubt that the Endorsement Guides cannot adapt to the development of the market, because the "clear and conspicuous" requirement is vague and difficult to apply across the channels through which advertisers transmit endorsed messages¹⁴¹. Therefore, some scholars still think that the FTC still has insufficient and ambiguous consumer protection¹⁴².

3.1.2.4. Summary of the Guide Documents and Rules of the U.S.

These guides and rules on online influencers' hidden advertisement are some guidance documents of the FTC, such as the Disclosure 101, which are not formal laws and regulations. Nevertheless, looking back at the source of the FTC's rights, the FTCA, as a formal statute, states that the FTC's responsibility is to refine specific administrative regulations. Therefore, the guidance to influencers provided by the FTC, which bases on the concept and responsibility of preventing unfair or deceptive acts or practices, does have certain legal authority. However, the strength of the legal

¹³⁹ See Footnote 88 above.

¹⁴⁰ See Footnote 88 above.

¹⁴¹ Byrne, Shannon. 2015. "The Age of The Human Billboard: Endorsement Disclosures in New Millennium Media Marketing". *Journal Of Business & Technology Law* 10 (2): 401.

¹⁴² Shirooni, Celine. 2018. "Native Advertising in Social Media: Is The FTC'S "Reasonable Consumer" Reasonable?". *Washington University Journal of Law & Policy* 56: 231.

authority of these documents and whether these documents can be formally used in court still need further research and discussion.

According to the authorization of the FTCA, the FTC can independently investigate and file lawsuits and finally educate consumers¹⁴³. From the perspective of the operation system, a hidden advertisement that infringes on consumer rights can be digested by the FTC, that is, the FTC can independently complete the investigation and evidence collection for the public prosecution, and even punish relevant individuals or legal persons within its own power. However, there are no legal provisions specific to online influencers' hidden advertisement, and more depends on the broader and vague "misleading advertising" and "deceptive advertising". Although hidden advertising can be summarized in these two general directions, when the legal provisions of "misleading advertising" and "deceptive advertising" are directly applied, there will be a lack of confidence. That is to say, if the regulations on false and misleading advertisements are to be applied to regulate hidden advertisement, more legal interpretations or explanations are needed to ensure the legality of applying false and misleading advertisement regulations. This is the point that the FTC's existing documents failed to do.

Hidden advertising is a marketing method based on the emerging area of influencer marketing. Demonstrating the inherent connection between hidden advertising and misleading advertising will make the validity and efficiency of citing legal provisions regulating misleading advertising more unconfident and weaker. This is the difficulty and challenges brought about by no specific regulation of hidden advertising laws and regulations. Returning to the FTC's regulations on influencers, these regulations or guidelines are the product of the FTC as a federal executive

¹⁴³ 15 U.S. Code §45b (f)

agency. According to the principles of the US Constitution: federal institutions must have affirmative authority for their actions¹⁴⁴. In theory, the guidance documents issued by the FTC should be authoritative and legal, but in practice, lawyers generally regard administrative regulations as the weakest of the sources of law¹⁴⁵. The FTC's own interpretation of the legal status of the Endorsement Guides also shows its shortcoming as an administrative interpretation, which is not binding.

Although the FTC has issued guidelines or suggestions on the behavior and speech of influencers, the existing academic literature shows that the current regulation of influencers by the FTC is far less tough and strict than when the FTC treated native advertising online traditionally¹⁴⁶, and there is scholar believes that the FTC's treatment of influencers, the relatively loose regulation of influencers, is undermining the FTC's consumer protections¹⁴⁷. To put it mildly, influencer marketing is exploding, but the law has not kept up¹⁴⁸.

There is an argument that the FTC has not taken meaningful action against influencers who have not disclosed a material connection between themselves and the products they are promoting¹⁴⁹ and seem to have created an advertising mechanism

¹⁴⁴ Grove, Tara. L. 2014. "Standing Outside of Article III". *University Of Pennsylvania Law Review* 162 (6 (May 2014): 1368.

¹⁴⁵ See Footnote 101 above.

¹⁴⁶ Terry, Christopher, Eliezer (Lee) Joseph Silberberg, and Stephen Schmitz. 2021. "Throw the Book at Them: Why the FTC Needs to Get Tough with Influencers.". *Journal Of Law and Policy* 29 (2): 406-459. doi:10.2139/ssrn.3775619.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

¹⁴⁹ "Denial Of FTC Rulemaking Powers". 1973. *Duke Law Journal* 1973 (1): 336. doi:10.2307/1371812.

for systematic deception¹⁵⁰. This lack of enforcement functionally undermines the agency's wider consumer protection authority—its efficacy and potency—under Section 5 (as well as Section 13) of the FTCA¹⁵¹. Therefore, just using the FTCA to solve the problems of hidden advertisement in real practice still has many incompatibilities, because the guidelines that explain the operation and regulations of hidden advertisement considered by the FTC are non-binding. Nevertheless, the FTC also shows that failure to comply with these guidelines would allow the FTC to use the FTCA to prosecute the unfair or deceptive practices. That is to say, these guidelines issued by the FTC do have authority in certain degree. At the same time, influencers and advertisers or brands should actively abide by these guidelines issued by the FTC in order to avoid possible lawsuits. Thus, the FTC should further clarify the legal status of these guidelines issued by the FTC, rather than just warn influencers and advertisers or brands of potential litigation risks for violating the guidelines.

This is the pain point of not having specific and formal regulations. It is because of the lack of specific provisions or the imperfect of citing existing laws to directly solve the problem that self-regulation has become another solution because self-regulation is believed to be heavier¹⁵². A case study will be presented in Part 3.1.3.2 of Chapter 3 to further explain and demonstrate how the FTC and related self-regulatory organizations view the concealment of online influencers' hidden

¹⁵⁰ See Footnote 146 above.

¹⁵¹ 15 U.S. Code § 45(a) and 53(b).

¹⁵² O'Neil, Ashley. 2014. "A Call for Truth in The Fashion Pages: What the Global Trend In Advertising Regulation Means For U.S. Beauty And Fashion Advertisers". *Indiana Journal of Global Legal Studies* 21 (2): 636. doi:10.2979/indjgolegstu.21.2.619.

advertisement and the material connection between influencers and advertisers or brands.

3.1.3. The Self-regulation Related to Online Influencers' Hidden Advertisement in the U.S.

This part will introduce the U.S. self-regulatory organization and its regulations on hidden advertisement, and will introduce and analyze a case to illustrate the cooperation between the self-regulatory organization and the administrative agency in the U.S.

3.1.3.1. A Brief Introduction to the "Better Business Bureau National Programs" in the U.S.

There are many self-regulatory organizations in the advertising industry in the United States that deal with consumer protection. Different from public regulation, self-regulation is a formation of external participation and external control¹⁵³. That is to say, the self-regulatory organization of consumer protection is not subject to the legal jurisdiction and control of the FTC. The FTC's guidelines are clear and easy to understand in explaining that online influencers' hidden advertisement is prohibited and that both influencers and brands are obligated to disclose their material connections. Therefore, this section will only broadly introduce one of the relevant self-regulatory organizations and one of the existing cases to further illustrate and demonstrate the operation of hidden advertising in practice and the logic of how online influencers' hidden advertisement is regulated.

¹⁵³ Ogus, Anthony. 1995. "Rethinking Self-Regulation". *Oxford Journal of Legal Studies* 15 (1): 97-108. doi:10.1093/ojls/15.1.97.

The Better Business Bureau National Programs (hereinafter, "the BBB National Programs") is a self-regulatory scheme where companies, industry experts, and trade associations work together within, to foster industry best practices in truth-in-advertising, child-directed marketing, data privacy, and dispute resolution¹⁵⁴. Although the BBB National Programs is a self-regulatory organization, its cooperation with the FTC is quite deep. In the article "Advertising FAQ's: A Guide for Small Business" published by the FTC, the FTC stated that "the Better Business Bureau (hereinafter, "the BBB")¹⁵⁵ often are in a better position to resolve disputes involving local businesses or local advertising¹⁵⁶." In addition, the official website of the FTC also shows that the BBB and other industry self-regulatory organizations sometimes refer possible consumer protection violations to the FTC¹⁵⁷. Hence the cases referred by the BBB National Programs to the FTC are also one of the sources of the FTC investigation.

The BBB National Programs' National Advertising Division (hereinafter, "the NAD ") is dedicated to truth in advertising. In order to ensure the influencer marketing and the use of product reviews in the advertising are both transparent and

¹⁵⁴ BBB National Programs. "BBB National Programs". Available at <https://bbbprograms.org/>. (Accessed 6/6/2022).

¹⁵⁵ BBB National Programs was originally affiliated with the Better Business Bureau (BBB), but BBB National Programs embraces its role as an independent organization since the restructuring of the Council of Better Business Bureaus in June 2019, so until 2019 BBB National Programs is still affiliated with the Better Business Bureau. However, information about BBB National Programs can still be found on the Better Business Bureau's official website. For more information, see https://bbbprograms.org/media-center/prd/cbbb_restructures (Accessed 6/8/2022).

¹⁵⁶ Federal Trade Commission. "Advertising FAQ's: A Guide for Small Business". Available at <https://www.ftc.gov/business-guidance/resources/advertising-faqs-guide-small-business>. (Accessed 6/8/2022).

¹⁵⁷ Federal Trade Commission. "Resolution of Referrals from BBB National Programs". Available at <https://www.ftc.gov/legal-library/browse/cases-proceedings/resolution-referrals-bbb-national-programs>. (Accessed 6/8/2022).

truthful, the NAD for advertisers or brand companies also offers five tips, including telling influencers or consumers to disclose the material connection with advertisers and monitoring the influencers to make sure they do¹⁵⁸. One of the most convincing cases shown on the BBB National Programs' website with online influencers' hidden advertisement is about The Coldest Water, LLC.

3.1.3.2. A Case Study of the Self-regulation Regime by the NAD

In the case of The Coldest Water¹⁵⁹, the advertisement in question were posted by various influencers on the social media platform TikTok. In each video, the Coldest Water bottle is placed somewhere in the foreground or background so that the brand logo can be seen clearly, but the influencer makes no mention or reference to the product itself. The challenged videos use the hashtag "#thecoldestwater" and tag the company (@thecoldestwater), but do not disclose a material connection to The Coldest Water.

In the initial investigation, the NAD questioned whether consumers would get a message because of these videos that the influencer who placed the Coldest Water bottle in the video endorsed the product but did not know that these influencers had a material connection with the brand company of the endorsed product¹⁶⁰. According to the FTC's Guides Concerning the Use of Endorsements and Testimonials in Advertising, "when there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the

¹⁵⁸ Brett, Laura. 2021. "5 Tips for Truthful and Transparent Influencer Marketing and Product Reviews". BBB National Programs. Available at <https://bbbprograms.org/media-center/blog-details/insights/2021/02/24/5-tips-for-influencer-marketing>. (Accessed 6/6/2022).

¹⁵⁹ BBB National Programs. "NAD Refers Coldest Water Bottle Tiktok Ad Claims To FTC". Available at <https://bbbprograms.org/media-center/decisions-details/coldest-water-bottle-to-ftc>. (Accessed 6/6/2022).

¹⁶⁰ Ibid.

endorsement (i.e., the connection is not reasonably expected by the audience), such connection must be fully disclosed". In the materials published by the NAD about The Coldest Water, there are no detailed arguments and evidence to explain how the NAD determined that The Coldest Water violated the Endorsement Guides about disclosing its material connection with influencers. However, from the NAD's description of The Coldest Water case, it reflects that The Coldest Water did not disclose that it supports and backs the endorsement of influencers. On June 30, 2021, the NAD referred The Coldest Water case to the FTC for further investigation. Nevertheless, on July 29, 2021, after the FTC received the referral from the NAD, the FTC contacted The Coldest Water and alerted The Coldest Water to NAD's referral to the FTC. Then The Coldest Water company agreed to engage with the NAD¹⁶¹. Finally, on November 16, 2021, The Coldest Water agreed to discontinue the claims about promoting the product on TikTok. Then, the NAD determined that The Coldest Water made appropriate efforts to ensure that its influencers' material connections were disclosed in TikTok videos for its Coldest Water bottle¹⁶².

The issue of this case is to determine whether there is a material connection between The Coldest Water and influencers. Although the influencers did not use words or text to directly recommend The Coldest Water products in their videos, the influencers placed The Coldest Water products in a prominent position in their videos. Considering the influence of influencers, the audience would notice their videos, not to mention the prominent position in the video. As a result, this shows that the

¹⁶¹ Federal Trade Commission. "The Coldest Water, LLC (Social Media Advertising)". Available at <https://www.ftc.gov/legal-library/browse/cases-proceedings/staff-letters/coldest-water-llc-social-media-advertising>. (Accessed 19/8/2022).

¹⁶² BBB National Programs. "NAD Finds the Coldest Water Took Appropriate Measures in TikTok Videos". Available at <https://bbbprograms.org/media-center/newsroom/coldest-water-material-connections-tiktok>. (Accessed 19/8/2022).

influencers deliberately let the audience see the products of The Coldest Water, and deliberately misled consumers to obtain a message that The Coldest Water's products in the video are endorsed by influencers. However, this intention was not disclosed to the audience. Accordingly, The Coldest Water's promotion can be regarded as a violation of the §255.5 of the Endorsement Guides that "when there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (i.e., the connection is not reasonably expected by the audience), such connection must be fully disclosed¹⁶³".

The Coldest Water case exemplifies the attitude and trends of online influencers' hidden advertisement in the U.S., in which regulations on hidden advertisement exist and are feasible. The Coldest Water used influencer's videos to promote the Coldest Water bottle, although there were no statements or words in the video indicating the influencer's direct recommendation, because the Coldest Water bottle was in the influencer's video. The prominent position of the Coldest Water bottle will mislead the audience that the Coldest Water is the product used and trusted by influencers, and the commercial intention between influencers and The Coldest Water that is, the material connection is not disclosed to the audience, all this commercial practice achieves the role of The Coldest Water to promote the period product. This is a specific example of online influencers' hidden advertisement, which also shows the commercial operation and good presentation of influencer marketing. The way NAD handled and referred to the FTC also reflects the policy attitude of the U.S. authorities towards online influencers' hidden advertisement, which is that of intolerance and prohibition.

The NAD's handling of The Coldest Water case is to investigate The Coldest

¹⁶³ See Footnote 88 above.

Water by itself as a self-regulatory organization, and its rights come from the voluntariness and cooperation of the regulated person. However, the NAD applied the Endorsement Guides issued by the FTC as the basis for determining the non-compliance of The Coldest Water's marketing practices, arguing that The Coldest Water and the related influencers did not have sufficient commercial promotion disclosures, and that this process of applying the FTC documents was a process of trusting and agreeing to these regulatory documents issued by the FTC. Again, when the NAD agrees that these regulatory documents have the force of law, it will invoke these provisions to persuade the regulated person that its conduct has been unreasonable or illegal.

From the NAD's own self-regulatory system to the NAD's statement that if The Coldest Water has no further disclosure or correction, the NAD will submit relevant materials to the FTC for further investigation, the process itself is a transformation from self-regulation to the rule of law. To a certain extent, the self-regulatory institutions involved in online influencers' hidden advertisement in the United States could achieve a good ecological cycle, that is, self-regulation first and then the rule of law. Nevertheless, this also exposes the shortcoming of the self-regulatory organization itself, that is, its limited authority. Even if members of the self-regulatory organization join these self-regulatory organizations, they may carry out non-compliant or even illegal behaviors, and even if the self-regulatory organization investigates and warns them, when the supervised object, like The Coldest Water, continues to let its wrongdoing happen, and self-regulatory organizations such as the NAD cannot really punish it, it will eventually turn to the real law.

3.2. The United Kingdom (the U.K.)

3.2.1. A Brief Introduction to the Legal System of the U.K.

The United Kingdom is a constitutional monarchy. A monarch is a sovereign head of State whose duties, functions, and powers are conscribed by convention. The United Kingdom consists of four countries with three distinct jurisdictions: England and Wales, Northern Ireland, and Scotland. Each jurisdiction has its own legal system. England and Wales have a common legal system that combines both the passing of legislation and the creation of precedents through case law. In England, the archetypal common law country, there is a hierarchy of sources, as follows: legislation (primary and secondary); the case law rules of common law and equity; parliamentary conventions; general customs; books of authority¹⁶⁴. The law of Northern Ireland is a common law system. It is administered by the courts of Northern Ireland, with ultimate appeal to the United Kingdom's Supreme Court in civil and criminal matters¹⁶⁵. Scots law is a unique legal system with an ancient basis in Roman law¹⁶⁶.

The legislation in the U.K. can be divided into two parts: primary legislation and secondary legislation. Primary legislation is the general term used to describe the main laws passed by the legislative bodies of the U.K., including the U.K. Parliament, for example, an Act of Parliament¹⁶⁷. Statutory instruments are the most frequently

¹⁶⁴ Slapper, Gary, and David Kelly. 2014. *The English Legal System*. 15th ed. London: Routledge, 77-204.

¹⁶⁵ GOV.UK. "Supreme Court of The United Kingdom". Available at <https://www.gov.uk/government/organisations/supreme-court-of-the-united-kingdom>. (Accessed 24/8/2022).

¹⁶⁶ Gordon, William. 2013. *Roman Law, Scots Law and Legal History*. 1st ed. Edinburgh University Press, 141.

¹⁶⁷ UK Parliament. "Primary Legislation". Available at <https://www.parliament.uk/site-information/glossary/primary-legislation/?id=32625>. (Accessed 7/8/2022).

used and hence the most common type of secondary legislation¹⁶⁸. Statutory instruments usually have either rule, order or regulation in their title. Statutory instruments are made by a government minister, a delegated person or an authorized body under powers given to them by an Act of Parliament. The principal legislature is the U.K. Parliament based in London. This is the only body¹⁶⁹ that has the power to pass laws that apply in all countries of the U.K.

3.2.2. Government Agency and Self-regulatory Organizations That Regulate the Advertising Industry in the U.K.

Regarding the regulation of advertisement, the United Kingdom relies on a system of self-regulation of the advertising industry that is run by a nongovernmental regulatory body known as the Advertising Standards Authority¹⁷⁰. Mainly, the Advertising Standards Authority (hereinafter, "the ASA") and the Committee of Advertising Practice (hereinafter, "the CAP") administer the self-regulatory system in the U.K. together. As a government authority, the Competition and Markets Authority (hereinafter, "the CMA"), is a non-ministerial department to help consumers in the U.K. While advertisers may have reasonably regular dealings with the ASA and the CAP, the CMA concentrates on issues that have the potential to distort markets as a whole, because the CMA as a government agency can use its consumer protection powers to address market-wide consumer problems, and enforces consumer protection law and uses its investigatory enforcement powers.

¹⁶⁸ UK Parliament. "Secondary Legislation". Available at <https://www.parliament.uk/site-information/glossary/secondary-legislation/?id=32625>. (Accessed 7/8/2022).

¹⁶⁹ UK Parliament. "UK Parliament". Available at <https://www.parliament.uk/about/>. (Accessed 7/8/2022).

¹⁷⁰ CAP. 2010. "The UK Code of Non-Broadcast Advertising and Direct & Promotional Marketing". Available at <https://www.asa.org.uk/static/47eb51e7-028d-4509-ab3c0f4822c9a3c4/4869041b-06d3-4745-b209d2a5c37500b3/The-Cap-code.pdf> (Accessed 9/6/2022).

3.2.2.1. The Advertising Standards Authority and the Committee of Advertising Practice

Advertisement in the U.K. are regulated through a system of "self-regulation" and "co-regulation". This shows that the work of the ASA and the CAP is an important part of the U.K. advertising regulation. The history of the establishment of the ASA and the CAP can be traced back to 1961, the Advertising Association¹⁷¹, following discussions with other industry associations, agreed that it was important that advertisement was welcomed and trusted by consumers in non-broadcast media (print, newspapers, posters, direct mailings, billboards, etc.) too¹⁷². As a result, the industry (agencies, media, and advertisers) came together to form the CAP and produced the first edition of the British Code of Advertising Practice¹⁷³. In 1962, the CAP established the ASA as the independent advertising regulator under the newly created Code.

The ASA serves as the main body of the self-regulatory system, with an investigative and advocacy role. Its tasks include investigating complaints, studying current trends and problem areas in advertising, and "ensuring that the system operates in the public interest"¹⁷⁴. The CAP is the sister organization of the ASA and is

¹⁷¹ The Advertising Association (AA) is the umbrella group representing brands, agencies, advertisers, trade associations and the media. Its aim is to promote and protect the role, rights and responsibilities of advertising and its impact on individuals, the economy and society. For more information see <https://adassoc.org.uk/about-us/> (Accessed 24/8/2022).

¹⁷² ASA. "Our History". Available at <https://www.asa.org.uk/about-asa-and-cap/our-history.html>. (Accessed 24/8/2022).

¹⁷³ Ibid.

¹⁷⁴ See Footnote 170 above, p.98.

responsible for writing the Advertising Codes. The ASA and CAP are committed to regulating in the U.K.

The work ASA and the CAP do is funded by the advertising industry¹⁷⁵. The role of the industry is to write the Advertising Codes¹⁷⁶, help advertisers to stick to the rules, and to pay for the self-regulatory system.

3.2.2.2. The Competition and Markets Authority

The CMA is an independent non-ministerial U.K. government department and is the UK's principal competition and consumer protection authority¹⁷⁷. The CMA derives its powers from the Enterprise and Regulatory Reform Act 2013¹⁷⁸. The function of the CMA is explained on their website, which includes 9 aspects. Among them, the functions of the CMA include protecting the rights and interests of consumers¹⁷⁹.

¹⁷⁵ Ibid.

¹⁷⁶ About the "Advertising Code", from the website of CAP and ASA, this term means "Non-broadcast Code" and "Broadcast Code". The "Non-broadcast Code" is the rule book for non-broadcast advertisements, sales promotions, and direct marketing communications (marketing communications), which is discussed in Part 3.2. of Chapter 3. For more detail, see <https://www.asa.org.uk/about-asa-and-cap/about-regulation/self-regulation-and-co-regulation.html> (Accessed 9/6/2022).

¹⁷⁷ GOV.UK. "Annual Plan 2022 To 2023". Available at <https://www.gov.uk/government/publications/competition-and-markets-authority-annual-plan-2022-to-2023/annual-plan-2022-to-2023#fn:4>. (Accessed 22/5/2022).

¹⁷⁸ Form the website of CMA, it shows that CMA also has new powers for the OIM, which officially launched on 21 September 2021, which are set out in the UK Internal Market Act 2020. The CMA will have further powers linked to the SAU which will be established by the Subsidy Control Bill which is currently going through Parliament. More information is shown at <https://www.gov.uk/government/publications/competition-and-markets-authority-annual-plan-2022-to-2023/annual-plan-2022-to-2023#fn:4> (Accessed 9/6/2022).

¹⁷⁹ See Footnote 177 above.

However, the CMA does not respond in detail to individual complaints¹⁸⁰. This shows that the CMA only handles the complaint information or investigates the case from a macro perspective. Then, as an ordinary consumer, it is difficult to protect rights through the CMA directly. After all, the CMA explained that it is because of its limited resources¹⁸¹. Nevertheless, as businesses or business practices, it is also worth noting that CMA does not respond in detail to complaints about businesses or business practices, other than super-complaints from designated consumer bodies as well¹⁸². In general, the role of the CMA is to make significant interventions in markets in cases where it can make a difference for consumers generally. A scholar believes that the United Kingdom's self-regulatory system can act as the frontline for advertising regulation and often is the most efficient way to resolve issues about advertising content¹⁸³. Therefore, it can be said that CMA's protection of consumers belongs to a wide range of policy protection. However, for specific complaints or rights protection of individuals, the United Kingdom still relies on self-regulatory organizations. Because the CMA claims to have limited resources to accept individual complaints, the existence of self-regulatory organizations can address this issue to accept and investigate individual complaints. Thus, the function of self-regulatory organizations seems to fill the gap that the CMA cannot solve.

3.2.3. Regulations and Guidance on Advertisement in the U.K.

Regulations that affect advertising can be roughly divided into two categories:

¹⁸⁰ GOV.UK. "How The CMA Handles Information and Complaints About Businesses". Available at <https://www.gov.uk/government/publications/how-the-cma-handles-information-and-complaints-about-businesses/how-the-cma-handles-information-and-complaints-about-businesses>. (Accessed 8/8/2022).

¹⁸¹ Ibid.

¹⁸² Ibid.

¹⁸³ See Footnote 152 above, p.622.

advertising to consumers and advertising to businesses¹⁸⁴. Regulations that affect advertising regarding consumer protection are mainly the Consumer Protection from Unfair Trading Regulations 2008 (hereinafter, "the CPRs")¹⁸⁵, which provides that: advertising cannot mislead or harass consumers by including false or deceptive messages; leaving out important information; using aggressive sales techniques¹⁸⁶. In addition to these two regulations, regarding the regulation of hidden advertisement, after discussions with influencers and institutions, the CMA (along with the CAP) published Influencers' Guide to Making Clear That Ads Are Ads (hereinafter, "the Guide")¹⁸⁷ on September 28, 2018, which is the first edition of the influencer guidance, to bring together all the necessary advisory information for influencers to ensure they comply with the relevant provisions of advertising rules and consumer protection legislation¹⁸⁸. It is indicated in the Guide that there may be many regulations applicable to an advertisement, but the most important ones are the "The U.K. Code of Non-broadcast Advertising and Direct & Promotional Marketing (hereinafter, "the CAP Code") and the Consumer Protection from Unfair Trading Regulations 2008 (the CPRs)"¹⁸⁹.

¹⁸⁴ GOV.UK. "Marketing And Advertising: The Law". Available at <https://www.gov.uk/marketing-advertising-law/regulations-that-affect-advertising>. (Accessed 7/8/2022).

¹⁸⁵ The Consumer Protection from Unfair Trading Regulations 2008. 2008 Available at <https://www.legislation.gov.uk/uksi/2008/1277> (Accessed 9/6/2022).

¹⁸⁶ GOV.UK. "Marketing And Advertising: The Law". Available at <https://www.gov.uk/marketing-advertising-law/regulations-that-affect-advertising>. (Accessed 8/8/2022).

¹⁸⁷ CAP, CMA. 2020. "Influencers' Guide to Making Clear That Ads Are Ads." Available at <https://www.asa.org.uk/static/9cc1fb3f-1288-405d-af3468ff18277299/INFLUENCERGuidanceupdatev6HR.pdf> (Accessed 9/6/2022).

¹⁸⁸ More information on the "Influencers' Guide to Making Clear that Ads are Ads" can be found on the Advertising Standards Authority (ASA) website, see <https://www.asa.org.uk/resource/influencers-guide.html> (Accessed 9/6/2022).

¹⁸⁹ See Footnote 187 above, p.2.

3.2.3.1. The Consumer Protection from Unfair Trading Regulations 2008

The CPRs is a statutory instrument in the U.K., adopted pursuant to the requirements of the European Communities Act 1972¹⁹⁰. CPRs was published on May 26, 2008, and revised on December 31, 2020. There are three main sections in the CPRs: a general ban on unfair commercial practices; a ban on misleading and aggressive practices which are assessed in light of the effect they have, or are likely to have, on the average consumer; a blacklist schedule of 31 banned trading practices. Part 2 details the unfair commercial practices that are prohibited in CPRs. In Part 2, unfair commercial practices mainly include unfair marketing communications, misleading marketing communications, and aggressive marketing communications.

There are several important points about the manifestation of unfair commercial practices, which are Regulation 2(1), Regulation 3(3)(a), Regulation 3(4), Regulation 4, Regulation 5(3)(b) and Schedule 1.

Regulation 3(3)(a) states that if it contravenes the requirements of "professional diligence", then the commercial practice is unfair. The definition of "professional diligence" is explained under Regulation 2(1) as follows

"the standard of special skill and care which a trader may reasonably be expected to exercise towards consumers which is commensurate with either

(a) honest market practice in the trader's field of activity, or

¹⁹⁰ The Consumer Protection from Unfair Trading Regulations 2008. Available at <https://www.legislation.gov.uk/uksi/2008/1277> (Accessed 9/6/2022).

(b) the general principle of good faith in the trader's field of activity."¹⁹¹

Combining the expressions of Regulation 3(3)(a) and Regulation 2(1), the importance of the role of "honest" and "good faith" in regulating commercial practice emerges. However, there is no clear explanation for the definition of "honest market practice" and "good faith" under the CPRs. Whether the concealment of advertising facts by influencers or advertisers can be considered as a violation of good faith remains to be verified. Therefore, this regulation seems to apply to online influencers' hidden advertisement, but the effect behind it remains to be considered.

Moreover, the word appearing in Regulation 3(3)(a) raises the question of whether the "trader" in the CPRs contains the influencers and advertisers or brands, which is discussed throughout this study. Regulation 2(1) gives an interpretation as follow

"Trader—

(a) means a person acting for purposes relating to that person's business, whether acting personally or through another person acting in the trader's name or on the trader's behalf, and

*(b) except in Part 4A, includes a person acting in the name of or on behalf of a trader;"*¹⁹²

¹⁹¹ The Consumer Protection from Unfair Trading Regulations 2008, Regulation 2(1).

¹⁹² The Consumer Protection from Unfair Trading Regulations 2008, Regulation 2(1).

From the interpretation of Regulation 2(1), the act of an influencer being paid by an advertiser or brand to promote its products or services is acting in the name of the advertiser or brand. However, this name is concealed or misled by influencers and advertisers or brands, and ultimately the audience is not aware of their connection. The interpretation of "trader" also includes "a person acting for purposes relating to that person's business". Hereby, advertisers or brands can be identified as a trader to promote their products or services. Consequently, the "trader" under the CPRs includes influencers and advertisers or brands.

Regulation 3(4) also describes other practices that would be defined as unfair practices as follow

"(a) it is a misleading action under the provisions of regulation 5;

(b) it is a misleading omission under the provisions of regulation 6;

(c) it is aggressive under the provisions of regulation 7; or

(d) it is listed in Schedule 1."¹⁹³

Schedule 1 describes the 31 commercial practices prohibited by the CPRs in all circumstances. Nevertheless, the most directly related to online influencers' hidden advertisement is commercial practices 11, which clearly states that

"Using editorial content in the media to promote a product where a trader has paid for the promotion without making

¹⁹³ The Consumer Protection from Unfair Trading Regulations 2008, Regulation 3(4).

*that clear in the content or by images or sounds clearly identifiable by the consumer (advertorial)."*¹⁹⁴

Regarding the definition of advertorial, there is no other explanation in the CPRs. However, this point is directly and clearly told to everyone that when a trader pays for promotion on the media, but the promotion content does not show that it is an advertisement, this is in line with the description of unfair commercial practices in the CPRs. That is to say, current online influencers' hidden advertisement, which conceals the fact of paid promotion by influencers and advertisers or brands when promoting products or services, is included as unfair commercial practices by the CPRs. At least at the legal level in the U.K., it is quite clear that online influencers' hidden advertisement is illegal.

Regulation 4 also explained that the promotion of unfair commercial practices is prohibited:

*"The promotion of any unfair commercial practice by a code owner in a code of conduct is prohibited."*¹⁹⁵

Regulation 2 (1) provides the definition of "code owner" and "code of conduct" as follows:

"Code of conduct means an agreement or set of rules (which is not imposed by legal or administrative requirements), which defines the behaviour of traders who undertake to be bound by

¹⁹⁴ The Consumer Protection from Unfair Trading Regulations 2008, Schedule 1.

¹⁹⁵ The Consumer Protection from Unfair Trading Regulations 2008, Regulation 4.

it in relation to one or more commercial practices or business sectors;

code owner means a trader or a body responsible for—

(a) the formulation and revision of a code of conduct; or

*(b) monitoring compliance with the code by those who have undertaken to be bound by it;*¹⁹⁶

The interpretation of "code owner" and "code of conduct" presents another related area of the CPRs. Because code of conduct is not imposed by legal or administrative requirements, it remains to be verified whether guidelines or regulations that self-regulatory agencies formulate and revise to restrict hidden advertising are within the definition of code of conduct. The logic that whether a self-regulatory agency can be identified as a code owner because of the system it has to constrain and supervise compliance with the documents it publishes requires more evidence to support.

These two issues also need to be considered in conjunction with Regulation 5(3)(b) in the CPRs that

"A commercial practice satisfies the conditions of this paragraph if—

it concerns any failure by a trader to comply with a commitment contained in a code of conduct which the trader has undertaken to comply with, if—

¹⁹⁶ The Consumer Protection from Unfair Trading Regulations 2008, Regulation 2 (1).

(i) the trader indicates in a commercial practice that he is bound by that code of conduct, and

(ii) the commitment is firm and capable of being verified and is not aspirational...¹⁹⁷

Regulation 5(3)(b) makes it a potential violation of the CPRs for a trader to fail to comply with a code to which the advertiser has committed to comply as part of its commercial practice. In other words, when influencers and advertisers or brands violate the regulatory documents of the self-regulatory organizations they are committed to, they may be identified by the CPRs as violating regulations on commercial practice. Combining Regulation 5(3)(b) and Regulation 4, the CPRs affirm and encourage traders to actively comply with the regulatory documents of self-regulatory organizations that traders have committed to comply to. This also confirms the current academic view that some paragraphs of the CPRs provide cohesion between the CPRs and the CAP Code¹⁹⁸.

Therefore, it can clearly be seen that online influencers' hidden advertisement is prohibited by the CPRs, at least in the U.K., online influencers' hidden advertisement is illegal. However, the penalty for violating Regulation 4 and Regulation 3(4) and paragraphs 11 of Schedule 1 is not clearly shown in the CPRs. This provides that although online influencers' hidden advertisement is prohibited by the CPRs, there is no law on how to prohibit and punish those who have violated the law. Applying the CPRs to regulate influencers and advertisers or brands is applicable, but the CPRs is not enough as a legal deterrent. Because there is no complete legal support to warn

¹⁹⁷ The Consumer Protection from Unfair Trading Regulations 2008, Regulation 5(3)(b).

¹⁹⁸ See Footnote 152 above, p.625.

influencers and advertisers or brands of the actual and specific legal penalties that they will have for publishing hidden advertisement.

3.2.3.2. The U.K. Code of Non-broadcast Advertising and Direct & Promotional Marketing

While the CAP Code is not law, compliance with the CAP Code could make the marketing communications are legal¹⁹⁹. The CAP code may be considered as a detailed rule book. The full text has 126 pages and is roughly divided into 22 sections. Section 1 describes the overall policy and spirit of the CAP Code, and the remaining 21 sections detail different types of advertising areas. The CAP Code applies to all print advertisements, and electronic materials such as e-mails, online advertisements, and videos²⁰⁰. The CAP Code lays out prohibitions against misleading advertising that are similar to those in the CPRs. Nevertheless, the CAP Code as a whole differs from the CPRs in some details.

In Section 1, the CPA Code emphasizes the principles of the entire Code. The basic principle underlying the CPA Code is that

*"All marketing communications...should be legal, decent, honest and truthful. And all marketing communications should be prepared with a sense of responsibility to consumers and society and should reflect the spirit, not merely the letter, of the Code."*²⁰¹

¹⁹⁹ See Footnote 170 above, p.3.

²⁰⁰ See Footnote 170 above, p.6.

²⁰¹ See Footnote 170 above, p.12.

The principle shows that the ASA's expected effect of the CAP Code is not limited to specific rules, but rather that parties who comply with the CAP Code will carry forward a broader spirit that extends beyond the CAP code.

The rules of Section 1 mainly introduce the behavior that the CAP Code requires the marketer to comply with from a broad perspective²⁰². Rule 1.6 under Section 1 shows as follows:

*"Marketing communications must respect the principles of fair competition generally accepted in business."*²⁰³

Although this is one of the 10 rules in Section 1, Rule 1.6 reflects the characteristics of the CAP Code, which is broad but not specific. In Rule 1.6, the CAP Code does not explain what "principles of fair competition" means. Rule 1.6 simply uses the word "respect" to limit the extent to which a marketer should be responsible in marketing communications. The question of whether "respect" implies that marketers should abide by these "principles of fair competition" is also not explained and answered.

In Section 2, Rule 2.4 provides a guide for the disclosure of hidden advertisement that

*"Marketers and publishers must make clear that advertorials are marketing communications; for example, by heading them 'advertisement feature'."*²⁰⁴

²⁰² In Introduction III "These definitions apply to the Code", the CAP Code defines "marketers" in the scope of advertisers, promoters, and direct marketers.

²⁰³ See Footnote 170 above, p.12.

Although the meaning of advertorial is not explained in the CPRs, the definition of "advertorial" can be found in Introduction III of the CAP Code as follow

*"An advertorial is an advertisement feature, announcement or promotion, the content of which is controlled by the marketer, not the publisher, that is disseminated in exchange for a payment or other reciprocal arrangement."*²⁰⁵

The ASA separates advertorial from traditional advertisements that require a publisher. The ASA also realized that the content and appearance of "an advertisement feature, announcement or promotion" are different from traditional advertisements. In 2007, when the Internet had become the second most-complained about medium, the ASA was still rejecting nearly two-thirds of complaints about online advertising that were not covered by the rules at the time²⁰⁶. Then the CAP Code expanded the ASA's rights to online advertising in 2010 to cover the social media²⁰⁷. Thus, the ASA and the CAP understand the challenges which are presented by the growth of online marketing communications²⁰⁸. The definition of the advertorial in the CAP Code and the ASA's disclosure requirements for an advertorial show that posting an advertorial on social media in the U.K. requires disclosure of the feature of the advertisement, which is to inform the audience that what they are seeing is an advertisement.

The CAP Code's rules of "advertorial" also reflect the trend of the U.K.

²⁰⁴ See Footnote 170 above, p.15.

²⁰⁵ See Footnote 170 above, p.8.

²⁰⁶ ASA. "Our History". Available at <https://www.asa.org.uk/about-asa-and-cap/our-history.html>. (Accessed 8/8/2022)

²⁰⁷ Ibid.

²⁰⁸ Ibid.

regulatory system. At least from the perspective of the self-regulatory system, regulators are concerned about the new challenges brought by the rapid development of the advertising industry. The regulatory trend is getting closer to the development of the existing market, including influencer marketing.

3.2.3.3. Influencers' Guide to Making Clear That Ads Are Ads

Unlike the CPRs and the CAP Code, the Guide is the guidance for influencers. Moreover, the Guide is published by the CAP and the CMA together. Therefore, the importance of the Guide is self-evident. The purpose of the Guide is to bring together all the advisory information influencers needed to ensure they were sticking to the ad rules and the relevant provisions from consumer protection legislation.

The Guide has a total of 16 pages, and each page has a different topic, which includes what the influencer should disclose, how to disclose it clearly, and which legislation and rules the influencer should pay attention to.

The third page of the Guide, "When do I need to disclose?", describes the circumstances under which influencers should disclose:

"When a brand gives an influencer a payment, any posts then promoting or endorsing the brand or its products/services become subject to consumer protection law.

Payment means any form of monetary payment; commission; a free loan of a product/ service; a free product/service

*(whether requested or received out of the blue); or any other incentive.*²⁰⁹

The Guide's prohibition and description of paid promotions are quite similar to the U.S. FTC's interpretation of "material connection" in the Part 3.1.2. of Chapter 3. In the U.S., the "material connection" could be defined as a personal, family, or employment relationship or a financial relationship – such as the brand paying influencers or giving influencers free or discounted products or services. However, for the interpretation of "payment" in the context of influencers' promotion, the Guide has more details as follows:

"If you're paid a specified amount of money to create and/or post a particular piece of content, this counts as 'payment'.

Nevertheless, this isn't the only type of arrangement that counts. If you have any sort of commercial relationship with the brand, such as being paid to be an ambassador, or you're given products, gifts, services, trips, hotel stays etc. for free, this is all likely to qualify as 'a payment [or other reciprocal arrangement]'.²¹⁰

Different from the one-sentence explanation style of the FTC's "material connection", the Guide explains most of the situations in which influencers may encounter "payment" when they are paid for promotion. The way the Guide explains "payment" also makes it clear to influencers that it would be illegal to not disclose all those kinds of payments to the audience. Such an explanation also fills the gaps in the

²⁰⁹ See Footnote 187 above, p.3.

²¹⁰ See Footnote 187 above, p.4.

Guide, the CAP Code, and the CPRs, avoiding situations where influencers and advertisers or brands take undue advantage of the loopholes in the rules and regulations due to a lack of detailed explanations.

Page 6 also explains that both influencers, the brand, and any agents involved in creating or publishing the content are responsible for ensuring that it makes clear when it's advertising or has a commercial message²¹¹. Pages 6 and 7 of the Guide also suggest that the best way to disclose advertising information is through tags, by directly labeling the post with "Ad", "Advert", "Advertising", "Advertisement", and "Advertisement Feature"²¹².

In general, if it is not clear from the context that something is an advertisement, then a clear and prominent disclosure is required. The entire guide is a good example of how and when influencers work with advertisers to disclose their business intent to their audiences. While the Guide is not a law as it is simply a guideline jointly published by the CMA and the CAP, the content of the Guide has provided a certain response to the unexplained issues of the CPRs and the CAP Code concerning the "advertorial". The Guide explains the specific requirements and details about disclosure of advertorial that are not covered in the CPRs and the CAP Code, so that influencers and advertisers or brands can be more aware of what information to disclose to consumers to make advertising features clear. At least through the Guide, the public can understand that online influencers' hidden advertisement is not welcomed by the U.K. regulatory system.

²¹¹ See Footnote 187 above, p.6.

²¹² See Footnote 187 above, p.7.

3.2.4. A Case of Non-disclosure of Paid Endorsements from the CMA

In this part, the author will introduce a case about the regulating of online influencers' hidden advertisement to show the attitude and handling of the CMA towards hidden advertising in the U.K., and how self-regulations could help the CMA to handle related cases.

Between March and July 2015, Social Chain used its own social media accounts, and arranged for widely followed social media influencers, to promote films, games, takeaways, and dating apps, without readers being informed that the content was paid-for advertising²¹³.

The issue, in this case, is whether Social Chain violated the CPRs by concealing the fact that it had commercial connections with influencers from its audiences on social media.

The materials disclosed by the CMA on its official website did not explain in detail which specific actions of Social Chain violated the CPRs. However, the "Summary of Undertakings" disclosed by the CMA²¹⁴ explained that the CMA did consider and use the CPRs when investigating Social Chain²¹⁵. Although in the "Summary of Undertakings" it is not clearly stated which article or regulations of the CPRs are violated by Social Chain, and the "Summary of Undertakings" also does not indicate other forms of penalties other than commitments made by the social chain.

²¹³ GOV.UK. "Non-Disclosure of Paid Endorsements (Social Media)". Available at <https://www.gov.uk/cma-cases/non-disclosure-of-paid-endorsements-social-media>. (Accessed 9/8/2022).

²¹⁴ Ibid.

²¹⁵ CMA. 2016. "SUMMARY OF UNDERTAKINGS PROVIDED TO THE CMA". Available at <https://assets.publishing.service.gov.uk/media/57ac3f5ded915d096e000066/summary-of-social-chain-undertakings.pdf>. (Accessed 9/8/2022).

Nevertheless, it is worth considering that the CMA requires Social Chain to comply with the UK Code of Non-Broadcast Advertising, Sales Promotion and Direct Marketing (the CAP Code) in particular Section 2 on the Recognition of Marketing Communications.

Going back to Section 2 of the CAP Code, which includes "advertorial" disclosure issues. In Part 3.2.3.2. of Chapter 3 the point about "advertorial" has been discussed. The Social Chain case also makes the interpretation of "advertorial" more concrete. This further confirms that the online influencers' hidden advertisement about influencers not disclosing or not clearly disclosing their commercial connections with advertisers or brands is determined by the CAP Code and the CMA to be non-compliant.

In The Coldest Water case which is discussed in Part 3.1.3.2. of Chapter 3 that the NAD, the self-regulatory organization in the U.S., did not investigate The Coldest Water further after The Coldest Water removed information about hidden advertising. The CMA did not take further action after Social Chain also made a commitment. That is to say, the CMA's punishment of Social Chain stops at the moment Social Chain has voluntarily engaged with the CMA and agreed to provide undertakings. Nevertheless, unlike The Coldest Water case, Social Chain co-founders Steven Bartlett and Dominic McGregor were both voluntarily engaged with the CMA and agreed to provide undertakings²¹⁶.

Moreover, the CMA has also written to 15 businesses that used the services of Social Chain, and 43 social media personalities that published content for Social Chain, to warn them that arranging or publishing advertising that is not clearly labeled

²¹⁶ Ibid.

may result in them breaching the law²¹⁷.

The case of Social Chain shows that the British CMA's regulatory objects for hidden advertising include not only influencers and advertisers or brands, but even the heads of related companies. It is also worth noting that in CMA's news report on Social Chain, the CMA remarked that "the CPRs is enforceable through the civil and criminal courts." This sentences again transmit a message that the CPRs is legal binding, and the CMA use the CPRs as a reference to investigate cases.

In general, it can be seen from the regulations of the government agency the CMA and the self-regulatory organizations the ASA and the CAP that hidden advertising is prohibited in the U.K. Schedule 1 of the CPRs stipulates that when promoting products or services, the traders should make consumers be able to recognize that this is an advertorial. The self-regulatory regulation of the CAP Code requires advertisements to be identifiable. The Guide requires influencers and advertisers or brands to disclose the material connection.

It is worth noting that the definition and interpretation of advertorial in the CPRs and the CAP Code are very similar to the operation mode of hidden advertisement. In fact, judging from the definition of advertorial, the operation of advertorial is not much different from that of hidden advertisement. They both package the promoted product or service into a natural form and conceal the commercial intent. Therefore, judging from the similar operation mode of hidden advertisement and advertorial, the CPRs and self-regulations on advertorial in the U.K. can be applied to hidden advertising. These regulations all show that the United Kingdom's regulatory framework of hidden advertisement is founded. For the regulation of hidden

²¹⁷ See Footnote 213 above.

advertisement, there is a specific case to support and explain how the U.K. government agencies deal with hidden advertising as well. All in all, the marketing method of hidden advertising is prohibited in the U.K., whether it is at the government level or the level of self-regulatory organizations.

3.3. The European Union (the EU)

3.3.1. Consumer Protection in the EU relating to online influencer marketing

In the EU legal system, the Treaty on European Union (and its subsequent amendments) has the status as constitutional effect²¹⁸. Within the framework of the EU, there are five types of legal instruments, which include regulations, directives, decisions, recommendations, and opinions²¹⁹. The particular legal instrument predominantly used by the EU in the field of consumer protection has been the directive²²⁰. The European Commission has adopted four Notices providing guidance on the application of the following EU consumer directives: Unfair Commercial Practices Directive, Consumer Rights Directive, Price Indication Directive (Article 6a), Unfair Contract Terms Directive²²¹.

²¹⁸ Garrett, Geoffrey. 1995. "The Politics of Legal Integration in The European Union". *International Organization* 49 (1): 171. doi:10.1017/s0020818300001612.

²¹⁹ E, Ugirashebuja, Cuyvers A, Ottervanger T, and Ruhangisa J E. 2017. *East African Community Law*. Erscheinungsort nicht ermittelbar: Brill, 133.

²²⁰ Valant, Jana. 2015. *Consumer Protection in the EU*. Ebook. European Parliamentary Research Service. Available at [https://www.europarl.europa.eu/RegData/etudes/IDAN/2015/565904/EPRS_IDA\(2015\)565904_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/IDAN/2015/565904/EPRS_IDA(2015)565904_EN.pdf). (Accessed 1/6/2022).

²²¹ European Commission. "Review of EU Consumer Law". Available at https://ec.europa.eu/info/law/law-topic/consumer-protection-law/review-eu-consumer-law_en. (Accessed 2/6/2022).

Generally speaking, a directive is an indirect instrument addressed to the member states of the EU. The directive provides the member states to achieve a certain result, and the member states must then implement this directive in their national law. Thus, the directive does not apply directly, and it needs to be transposed into the national laws of each EU member state. Nevertheless, the function of the directive is as guidance for all the member states²²².

At the EU level, no specific legislation focusing on influencer marketing is in place, but horizontal legislation on consumer protection applies²²³. The Unfair Commercial Practices Directive (hereinafter, "the UCPD"), in particular, provides the general framework for violations of consumer protection rules. The UCPD can be used to define the issue of misleading advertising in influencer practices. The Consumer Rights Directive and other legislation on consumer contracts apply to influencers who act as sellers with regard to the obligations of online traders to disclose a wide array of information to consumers before the conclusion of a contract²²⁴. From the Digital Services Act (hereinafter, "the DSA") proposal, the transparency issues with regards to online advertising are covered in the DSA proposal²²⁵.

²²² Ibid.

²²³ Michaelsen, Frithjof, Luena Collini, Cécile Jacob, Catalina Goanta, Sara Elisa Kettner, Sophie Bishop, Pierre Hausemer, Christian Thorun, and Sevil Yesiloglu. 2022. *The Impact of Influencers on Advertising and Consumer Protection in The Single Market*. Ebook, 70. Available at https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703350/IPOL_STU%282022%29703350_EN.pdf. (Accessed 2/6/2022).

²²⁴ Ibid., p.62.

²²⁵ European Commission. *Proposal For A REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL On Contestable and Fair Markets in The Digital Sector (Digital Markets Act)*. 2020. Ebook. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020PC0842&from=en>. (Accessed 2/6/2022).

3.3.1. The Digital Services Act Proposal

As the latest legal instrument for the digital market at the EU level, the DSA sets clear obligations for digital service providers, such as social media or marketplaces, to tackle the spread of illegal content, online disinformation and other societal risks²²⁶. This helps analyze the latest trends in regulating online influencers' hidden advertisement.

On May 20, 2022, on the official website of the European Commission, the European Commission further answered that the DSA is a regulation that will be directly applicable across the EU under the enforcement by the European Commission. The obligation of the DSA includes improving the transparency of all advertising on online platforms and the commercial communication of influencers²²⁷. In more detail, the DSA will empower users to clearly see when content is sponsored or organically published on the platform, and also to clearly see when influencers are promoting commercial messages²²⁸. This also shows that when the DSA comes into effect officially, the requirements and regulations of the DSA regarding influencer marketing will also apply to the entire Member States²²⁹.

In addition to giving consumers a right to know, that is, the right to know

²²⁶ European Parliament. "Digital Services: Landmark Rules Adopted for A Safer, Open Online Environment". Available at <https://www.europarl.europa.eu/news/en/press-room/20220701IPR34364/digital-services-landmark-rules-adopted-for-a-safer-open-online-environment>. (Accessed 24/8/2022).

²²⁷ European Commission. "Questions And Answers: Digital Services Act*". Available at https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2348. (Accessed 2/6/2022).

²²⁸ Ibid.

²²⁹ The DSA will be directly applicable across the EU fifteen months after entry into force (that is 20 days after publication in the Official Journal following the final adoption of the text), or from 1 January 2024, whichever is later.

whether the content they see is sponsored, the DSA will also give consumers a new right: "a right to complain to the platform."²³⁰ This is a right granted to consumers and a responsibility imposed on the platform, that is, the platform should hear consumer complaints and seek out-of-court settlements. Nevertheless, it also raises a new legal question about how much power platforms have to resolve consumer complaints, and the reasonableness of such complaints being resolved out of court when they involve some compulsory provisions which they have to report to the authority. The extent to which settlements or agreements between platforms and consumers or other parties can bind each other is also a question.

Moreover, the DSA also requires platforms to take additional measures to mitigate risks and enable oversight²³¹. The DSA also requires platforms to assess whether and how their advertising systems are manipulated or otherwise contribute to societal risks, and take measures to mitigate these risks²³². The DSA requires platforms to assess and reduce the risks of their own advertising systems giving platforms more obligations to manage risks as well proactively.

Nevertheless, the DSA also has many advantages. For example, unlike the FTC's regulated advertising which often only involves influencers and advertisers or brands, the DSA connects influencers, advertisers, brands, and platforms together. The DSA's approach is not to blame a single party, but to solve specific problems and manage risks in the advertising environment. The DSA's approach is more like putting influencers, advertisers, brands, and platforms into the same regulatory system to ensure that the risks of each party can be controlled or mitigated.

²³⁰ See Footnote 227 above.

²³¹ See Footnote 227 above.

²³² See Footnote 227 above.

3.3.2. Consumer Protections Related to Hidden Advertisement in the Certain EU Member States

According to some scholars, the Italian legislative framework seems to ensure a solid foundation for the development of the self-regulatory technique²³³. In Italy, industry self-regulation is more likely than the courts to find advertising to be misleading²³⁴. Therefore, research on Italian advertising self-regulation may benefit this study's analysis of hidden advertisement self-regulation. Scholars also consider the Dutch advertising regulatory system to be an active arbiter of advertising challenges²³⁵. Advertising regulation in the Netherlands relies heavily on the strength of self-regulatory organizations²³⁶. There is a long-respected tradition of self-regulation in the Netherlands, and because of the consumer and business respect it generates, its rulings are considered to be as significant as judicial decisions²³⁷. Therefore, the regulations on self-regulatory organizations in the Netherlands are also worthy of attention.

²³³ Rodriguez, Simona. 2007. "Self-Regulation as A Regulatory Strategy: The Italian Legal Framework". *Utrecht Law Review* 3 (2): 156. doi:10.18352/ulr.51.

²³⁴ Schricker, Gerhard. 1990. "Law and Practice Relating to Misleading Advertising in The Member States of the EC". *International Review of Industrial Property and Copyright Law* 21(5): 631-636.

²³⁵ Petty, Ross D. 1995. "European Regulation of Misleading Advertising: A Conceptual Analysis". *Tolley's Journal of Media Law and Practice* 16 (4): 151.

²³⁶ Rohmer, Bradford. 2012. *Misleading Advertising Regulation in The EU And Its Member States*. Ebook, 11-12. Available at https://friendsoftheearth.eu/wp-content/uploads/2012/02/foee_greenwash_confronted_0907.pdf. (Accessed 25/8/2022).

²³⁷ Schulze, Reiner, and Hans Schulte-Nölke. 2003. *Analysis of National Fairness Laws Aimed at Protecting Consumers In Relation To Commercial Practices*. Ebook, 23. Available at https://lirias.kuleuven.be/bitstream/123456789/204413/1/unfair_practices_en.pdf. (Accessed 25/8/2022).

3.3.2.1. Italy

The Italian Competition Authority (Italian: Autorità Garante della Concorrenza e del Mercato, AGCM) (hereinafter, "the ICA") is an independent administrative authority, established by Law no. 287 of 10 October 1990 ("The Competition and Fair Trading Act"). The ICA has the right to repression of unfair commercial practices, misleading and unlawful comparative advertising²³⁸.

The ICA has been following the activities of influencer marketing. In 2017, the ICA issued a press release emphasizing that "advertising must always be clearly recognizable"²³⁹, and in 2018, the ICA reiterated its policy of "hidden advertising is always prohibited, including on social media"²⁴⁰. The ICA believes that hidden advertising is prohibited by the Consumer Code and urges all parties involved in influencer marketing to comply with the Consumer Code. Since the ICA intervened in influencer marketing, the ICA believes that influencers and companies now hold more transparent behaviors towards consumers and use hashtags and references which alert consumers about the advertising nature of the contents. This shows that using hashtags and references to alert consumers about the advertising nature of the contents is effective in Italy. Nevertheless, the ICA also admits the evolution of the means made available by social media to influencers and companies. Accordingly, the ICA's regulatory means are also constantly improving. The ICA not only pays attention to

²³⁸ AGCM. "AGCM - Autorita' Garante Della Concorrenza E Del Mercato". Available at <https://en.agcm.it/en/about-us/>. (Accessed 9/8/2022).

²³⁹ AGCM. "AGCM On Influencer Marketing: Advertising Must Always Be Clearly Recognizable". Available at <https://en.agcm.it/en/media/detail?id=6b5b47bd-b719-47d2-b5a3-b124bb132cb4>. (Accessed 9/8/2022).

²⁴⁰ AGCM. "Second Moral Suasion on Influencer Marketing: Hidden Advertising Is Always Prohibited, Including on Social Media". Available at <https://en.agcm.it/en/media/detail?id=33c8815f-b7d5-40f0-a9e0-af950d384277>. (Accessed 9/8/2022).

influencers with a large number of followers, but also pays attention to influencers with a relevant but not extremely high number of followers.

Thus, the ICA requires all content delivered through social media should send the message by conveying a specific warning or hashtag, such as "#advertising" "#sponsored" "#paid ad" or "# product supplied by..." as well as a brand logo to make the promotional purpose of the post and content clearly identifiable²⁴¹.

The Istituto dell'Autodisciplina Pubblicitaria (hereinafter, "the IAP") is a good example of a self-regulatory organization in Italy, on the display of influencer advertising regulations²⁴². As Italy's advertising authority standards, the IAP is a private body that since 1966 has regulated advertisements to ensure that the information imparted to consumers is correct and that businesses compete fairly²⁴³. It is clearly stated in The Code of Marketing Communication Self-Regulation Italy (hereinafter, "the Code") published by the IAP that "marketing communication must be clearly distinguishable as such"²⁴⁴.

In 2016, the IAP adopted "Digital Chart", a tool that provides the first answer to the online advertising transparency needs²⁴⁵. Digital Chart requires that business practices spread through the Internet, no matter what method is used, must use appropriate measures to disclose its promotion purpose, including the need for

²⁴¹ Ibid.

²⁴² Reale, Mariacristina. 2019. "Digital Market, Bloggers, And Trendsetters: The New World of Advertising Law". *Laws* 8 (3): 9. doi:10.3390/laws8030021.

²⁴³ IAP. "About - IAP". Available at <https://www.iap.it/about/?lang=en>. (Accessed 7/6/2022).

²⁴⁴ IAP. 2021. "The Code - IAP". Available at <https://www.iap.it/about/the-code/?lang=en>. (Accessed 7/6/2022).

²⁴⁵ See Footnote 242 above, p.9.

influencers to hashtag "Pubblicità/Advertising" or "Sponsorizzato da ... brand/Sponsored by ... brand", those labels should be clearly disclosed in the post when influencers are endorsing the product²⁴⁶.

Similar to the self-regulatory organizations in other countries, in terms of prohibiting hidden advertising, the self-regulatory regulations of the IAP are similar to the administrative authority the ICA. However, it is not difficult to see from Italy as a whole that government authorities and non-governmental self-regulatory organizations believe that hidden advertisement is unacceptable. All related administrative interpretations or self-regulatory documents show Italian trends and attitudes about hidden advertisement, that is, the parties involved in influencer marketing are responsible for disclosing and clearly informing the audience that the content they see is sponsored.

3.3.2.2. The Netherlands

In terms of online influencers' hidden advertisement, the Netherlands is different from the U.S., which is mainly based on the policies and regulations of administrative agencies. The Netherlands relies more on self-regulation. On the official website of the Dutch government, it is emphasized that advertisers in the Netherlands must keep to the Dutch Advertising Code (Dutch: Nederlandse Reclame Code, NRC) (hereinafter, "the DAC")²⁴⁷. The DAC applies to all advertising, regardless of the medium the advertiser use. The Advertising Code Authority (Dutch: Stichting Reclame Code, SRC) (hereinafter, "the ACA") has drawn up the Dutch Advertising

²⁴⁶ IAP. "Digital Chart Regulations on the Recognizability of Marketing Communication Distributed over the Internet". Available at <https://www.iap.it/regulations/?lang=en> (Accessed 14/9/2022).

²⁴⁷ Business.gov.nl. "Rules On Advertising". Available at <https://business.gov.nl/regulation/advertising/>. (Accessed 9/8/2022).

Code. The ACA has been the body dealing with the self-regulating system of advertising since 1963²⁴⁸. That's why the Dutch advertising regulations rely more on self-regulation because the DAC is a rule recognized by the Dutch government. What is puzzling is that only the DAC is displayed in the rules on advertising on the official website of the Dutch government, and no other laws or regulations are introduced²⁴⁹.

The DAC is divided into a general section and a section of special advertising codes. The general section contains a body of rules with which all advertising should comply. The special codes may apply to advertising for specific products and services.

The provisions about misleading advertising in Articles 7 and 8 of the DAC and the recognizability of advertising referred to in Article 11.1 of the DAC are generally applicable to online influencers' hidden advertising²⁵⁰. More specifically, there are specific regulations on influencer marketing in the DAC, which is the Advertising Code for Social Media & Influencer Marketing 2019 (hereinafter, "the RSM ")²⁵¹.

The requirement of "Disclosure and Recognisability of a Relevant Relationship" under Article 3 of the RSM states that advertising through social media must be

²⁴⁸ Stichting Reclame Code. "About The Stichting Reclame Code - Stichting Reclame Code". Available at <https://www.reclamecode.nl/english/>. (Accessed 9/8/2022).

²⁴⁹ For more information on advertising in the Netherlands, see <https://business.gov.nl/regulation/advertising/> (Accessed 9/8/2022).

²⁵⁰ In the Advertising Code for Social Media & Influencer Marketing (RSM) of DAC, Article 7 (Miscellaneous Provisions) explains that the provisions in RSM do not affect the general provision of DAC, and more attention should be paid to misleading advertising and the recognizability of the advertising part.

²⁵¹ Stichting Reclame Code. "Advertising Code for Social Media & Influencer Marketing (RSM) 2019 - Stichting Reclame Code". Available at <https://www.reclamecode.nl/nrc/advertising-code-for-social-media-influencer-marketing-rsm-2019/?lang=en>. (Accessed 7/6/2022).

clearly recognizable²⁵². If a distributor²⁵³ receives compensation in money or in kind from the advertiser, this must be explicitly stated in the advertising message²⁵⁴.

The RSM explains what "distributor" means in Article 2. Distributor refers to the party that has a relevant relationship with the advertiser and that distributes advertising through social media²⁵⁵. By the meaning of the text, the scope of the distributor is larger than that of the influencer, because the distributor does not limit the content publishers need to have enough influence on social media. At the same time, the interpretation of "relevant relationship" in the RSM is quite similar to the FTC's interpretation of "material connection". Both are about the advertiser and the influencer directed at (causing the) distribution of advertising through social media, in return for payment or any benefit²⁵⁶.

In other words, if an advertiser offers the influencer any benefit for the distribution of advertising through social media, the relationship between advertiser and influencer must be clearly recognizable and disclosed. Whether this is sufficiently clear, is subject to the context and the platform used²⁵⁷. That is to say, online influencers' hidden advertisement will not work on the domestic level of the

²⁵² Ibid.

²⁵³ The definition of Distributor in Article 2 of RSM is: the party that has a relevant relationship with the advertiser and that distributes advertising through social media. A distributor may be a natural person or legal entity. The distributor is understood not to include an operator of social network sites and forums that facilitates communication between participants and that takes a neutral stand regarding content. And RSM also exemplifies that bloggers, vloggers and/or online content creators can be considered as distributors.

²⁵⁴ See Footnote 251 above.

²⁵⁵ See Footnote 251 above.

²⁵⁶ See Footnote 251 above.

²⁵⁷ See Footnote 251 above.

Netherlands, the DAC and the RSM directly and clearly stipulate that the mode of hidden advertising is prohibited.

The Netherlands' regulatory model for online influencers' hidden advertising is similar to that of the U.K., which also relies on self-regulation, but unlike the U.K., the Dutch administrative agency's intervention in social media is not as obvious and direct as the CMA. However, the Dutch government's reliance on and recognition of the DAC also proves that it has delegated regulatory power to self-regulatory organizations to a certain extent. As a result, a quite delicate and harmonious relationship has been formed between the government and self-regulatory organizations.

In general, the latest legislation on digital markets of the EU, the DSA, has provisions for social media platforms. Compared with the U.S. and the U.K., where the regulatory object is mainly aimed at influencers and advertisers or brands, the EU has delegated a certain of responsibility for regulating online advertising to social media platforms. In addition, the regulating of hidden advertisement in EU member states also has self- regulations to play a regulatory role.

3.4. Canada

3.4.1. A Brief Introduction to the Legal System of Canada

Canada's legal system is based on the English and French systems. After the Battle of Quebec in 1759, Canada fell under English common law, except for Quebec, which follows civil law²⁵⁸. Thus, Canada's legal system is based on a combination of

²⁵⁸ Department of Justice Canada. "Where Our Legal System Comes From - About Canada's System of Justice". Available at <https://www.justice.gc.ca/eng/csj-sjc/just/03.html>. (Accessed 10/8/2022).

common law and civil law. The source of law in Canada can be divided into four parts: the constitution; legislation; regulation; the common law.

Canada is a federation that is a union of several provinces and territories with a central government. Thus, Canada has both a federal parliament in Ottawa to make laws for all of Canada and a legislature in each of the ten provinces and three territories that deals with laws in their areas. Laws enacted at either level are called statutes, legislation, or acts.

In Canada, to become law, legislation must be approved by Parliament. The proposed legislation is introduced in Parliament in the form of a bill that provides the basis to amend or repeal existing laws or put new ones in place²⁵⁹.

Because Parliament and provincial and territorial legislatures often pass laws to give departments or other government organizations the authority to make specific laws called regulations. Regulations have the force of law²⁶⁰. Regulations carry out the purposes of the general laws or expand on them.

When it comes to consumer protection, the primary regulator is the Competition Bureau. The Competition Bureau is the primary government body responsible for enforcing laws about misleading marketing practices. Plus, the Competition Bureau is an independent agency that protects and promotes competition for the benefit of Canadian consumers and businesses. The law related to online influencers' hidden advertisement is the Competition Act.

²⁵⁹ Department of Justice Canada. "How New Laws And Regulations Are Created". Available at <https://www.justice.gc.ca/eng/laws-lois/index.html>. (Accessed 10/8/2022).

²⁶⁰ See Footnote 258 above.

3.4.2. The Competition Act

The Competition Act is a Canadian federal law governing competition law in Canada. The Competition Act contains both criminal and civil provisions aimed at preventing anti-competitive practices in the marketplace. The Competition Act is enforced and administered by the Competition Bureau, and cases are adjudicated by the Competition Tribunal.

Part VI of the Competition Act provides for offenses in relation to the competition. Article 52 is about false or misleading representations:

"52 (1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect."²⁶¹

Article 52(1) provides that after being sponsored by an advertiser or brand, influencers shall not mislead audiences in their posts that they are not getting any sponsorship. Nevertheless, Article 52 (1) restricts representations of false or misleading to be "in a material respect". Nevertheless, there is no interpretation of "material respect" in the Competition Act. In other words, influencers promoting sponsored products or services in their posts without disclosing their commercial connections with advertisers or brands to audiences may be considered as false or misleading representations. Nevertheless, this possibility will be affected by the case

²⁶¹ Competition Act (R.S.C., 1985, c. C-34), Article 52. Available at <https://laws-lois.justice.gc.ca/eng/acts/c-34/> (Accessed 10/8/2022).

because it needs to debate whether the representation is false or misleading in a material respect.

There is the question of the applicability of influencer marketing in the provisions of "deceptive marketing practices". Article 74.01(1)(a) provides that

*"A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, (a) makes a representation to the public that is false or misleading in a material respect; ..."*²⁶²

Regarding the provisions on misrepresentations, Article 74.01(1)(a) has provisions on "representation to the public that is false or misleading in a material respect". The same problem as Article 52 (1), that is, "in a material respect" needs to be concerned as an element when viewing misrepresentations and representations of false or misleading.

The Competition Bureau has been emphasizing and explaining deceptive marketing practices provisions of the Competition Act apply to anyone who is promoting a product, service, or any business interest. The Competition Act applies to influencers as well. However, the obstacle to actually using the Competition Act to solve the legal issues of influencer marketing still exists. The criteria for determining how an influencer makes a false or misleading statement in a material respect is ambiguous. For the promotion of a product or service, it is not clear which factors of representations can be material. Nevertheless, for a deeper understanding of

²⁶² Competition Act (R.S.C., 1985, c. C-34), Article 74.01(1)(a).

"material", the Competition Bureau's article on influencer marketing and the Competition Act provides a reference value.

In the Competition Bureau's publication entitled "Influencer marketing and the Competition Act"²⁶³, it is stated that influencers should disclose all material connections influencers have with the business, product or service they are promoting²⁶⁴. The Competition Bureau explains the meaning of "material connections" that: when influencers "have received payment in money or commissions; received free products or services; received discounts; received free trips or tickets to events; or a personal or family relationship."²⁶⁵

Connecting the Competition Bureau's explanation of "material connections" and the Article 52(1) and Article 74.01(1)(a) of the Competition Act regarding "in a material respect", the Competition Bureau explains the possible scope of "material" in "in a material respect". Thus, influencers should pay attention to their material connections, and they should also be cautious about the representation of material connections.

Therefore, in the latter part of article "influencer marketing and the Competition Act", the Competition Bureau explains the best practices that influencers should follow when disclosing these connections as follow:

"1. Make sure that your disclosures are as visible as possible.

²⁶³ Competition Bureau. "Influencer Marketing and The Competition Act - Competition Bureau Canada". Available at <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04512.html>. (Accessed 10/8/2022).

²⁶⁴ Ibid.

²⁶⁵ Ibid.

...

*2. Make sure your disclosures are clear and contextually appropriate.*²⁶⁶

Therefore, in Canada, influencers who post their sponsored promotions on social media should inform their audiences of material connections between themselves and advertisers or brands in accordance with the Competition Act and the Competition Bureau. The influencer is responsible for letting the audience clearly know that the promotion published by the influencer is sponsored content.

3.4.3. Advertisement Standards and Self-regulation

In Canada, in addition to the Competition Act, which should attract the attention of influencers, the Canadian Code of Advertising Standards (hereinafter, "the CAS") administered by "Ad Standards" also needs to be paid attention to. Ad Standards is an independent, nonprofit organization in Canada²⁶⁷. Although Ad Standards is a self-regulatory organization, it communicates with the Competition Bureau. The Competition Bureau considers the work of Ad Standards to be valuable²⁶⁸. Furthermore, when introducing influencer marketing, the Competition Bureau mentioned the Disclosure Guidelines published by Ad Standards. The Competition Bureau believes that Disclosure Guidelines set out best practices for influencer marketing and provide detailed examples of disclosure strategies for different online

²⁶⁶ Ibid.

²⁶⁷ Ad Standards. "About – Ad Standards". Available at <https://adstandards.ca/about/>. (Accessed 5/6/2022).

²⁶⁸ Competition Bureau. "The Deceptive Marketing Practices Digest — Volume 4 - Competition Bureau Canada". Available at <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04372.html>. (Accessed 5/6/2022).

scenarios²⁶⁹.

In the case of influencer marketing, Disclosure Guidelines consider omitting a disclosure of a material connection may be considered misleading advertising and could result in a violation of Clause 1(b) and 1(f) of the CAS. Moreover, the main provision related to the Disclosure Guidelines' consideration under the CAS is that

"(a) Advertisements must not contain, or directly or by implication make, inaccurate, deceptive or otherwise misleading claims, statements, illustrations or representations.

...

(f) The advertiser must be clearly identified in the advertisement, excepting the advertiser of a "teaser advertisement" as that term is defined in the Code."

In addition to the CAS regulations, the Disclosure Guidelines provide numerous examples to illustrate that influencers should be accurate and clear in their disclosure of material connections. For example, the Disclosure Guidelines suggest that closures should be clear, identifiable, and use widely accepted hashtags. The examples shown in the Disclosure Guidelines also show that accurate and clear disclosure can be done. Influencers should not use the excuse that they have done their best for disclosure to cover up their failures with unclear or even undisclosed disclosures. Both the rules and guidelines of the self-regulatory body can provide a good explanation and interface between the practice of influencer marketing and the existing law.

²⁶⁹ Ibid.

In general, although the Competition Act does not have a direct rule that the Competition Act may be applied to influencer marketing, the Competition Bureau, which is a government agency, has explained in its publication that the Competition Act applies to hidden advertisement. Additionally, the Competition Bureau also explained the definition of material connections between influencers and advertisers or brands, which is roughly the same as the definition in the U.S.²⁷⁰ and the U.K.²⁷¹, which explains that material connections is built when influencers are accepting money or free products from advertisers or brands, or when there is a personal or family relationship between influencers and advertisers or brands. The Competition Bureau also emphasized that the disclosure of material connections should be clear and visible to audiences. Canada's self-regulatory organizations also exemplify how influencers should be accurate and clear in disclosing material connections in their self-regulatory regulations. Therefore, from the perspective of government regulation and self-regulation in Canada, hidden advertising is prohibited.

3.5. Association of Southeast Asian Nations (ASEAN)

3.5.1. Regional Framework on Consumer Protection in ASEAN

Consumer protection has long been recognized as an integral part of the ASEAN economic and social integration process²⁷². Due to various historical reasons in ASEAN member states, ASEAN still does not have a general uniform consumer

²⁷⁰ See the discussion in Part 3.1.2. and 3.1.3 of Chapter 3.

²⁷¹ See the discussion in Part 3.2.3. and 3.2.4. of Chapter 3.

²⁷² ASEAN. Handbook On ASEAN Consumer Protection Laws and Regulations. 2021. Ebook. 2nd ed.

Available at

<https://aseanconsumer.org/file/ASEAN%20Handbook/2nd%20Edition%20of%20The%20ASEAN%20Consumer%20Protection%20Handbook%20-%202013Sep21.pdf>. (Accessed 6/6/2022).

protection law²⁷³. On the whole, the regulation of online influencers' hidden advertisement in ASEAN countries is not much different from most other countries or regions in that there are no laws and regulations specifically for hidden advertising and no regulations for influencer marketing. However, the same general rules from the perspective of consumer protection laws in ASEAN countries can still be applied to protect the rights of consumers under hidden advertising.

Although the legal, economic, and political systems and development among ASEAN member states are different, the ASEAN member states involved in The ASEAN Strategic Action Plan on Consumer Protection 2016-2025 (hereinafter, "the ASAPCP") have the same idea of building consumer confidence in fair and transparent ASEAN markets²⁷⁴. Moreover, ASEAN hopes to establish a Common ASEAN Consumer Protection Framework through higher levels of consumer protection legislation. From the ASEAN High-Level Principles (hereinafter, "the AHLP"), the AHLP states that the aims of the ASEAN Consumer Policy include empowering consumers to make choices based on accurate, clear, and consistent information²⁷⁵. To emphasize consumer protection, the ASEAN Committee on Consumer Protection (hereinafter, "the ACCP") was established by the ASEAN Economic Ministers in 2007. The ACCP serves as the focal point to implement and

²⁷³ Thirawat, Juthamas. 2022. "E-Commerce In ASEAN: An Emerging Economic Superpower and The Case for Harmonizing Consumer Protection Laws". *South Carolina Journal of International Law And Business* 18 (2): 40-80.

²⁷⁴ ASEAN. The ASEAN Strategic Action Plan for Consumer Protection 2016- 2025: Meeting the Challenges of a People-Centered ASEAN Beyond 2015. Ebook. Available at [https://aseanconsumer.org/file/pdf_file/ASAPCP%20\(UPLOADING\)%20-%2011Nov16%20Final.pdf](https://aseanconsumer.org/file/pdf_file/ASAPCP%20(UPLOADING)%20-%2011Nov16%20Final.pdf). (Accessed 5/6/2022).

²⁷⁵ ASEAN. The ASEAN High-Level Principles (AHLP). Ebook. Available at https://aseanconsumer.org/file/pdf_file/ASEAN%20High%20Level%20Principles%20on%20Consumer%20Protection.pdf. (Accessed 5/6/2022).

monitor regional arrangements and mechanisms to foster consumer protection in the ASEAN Economic Community²⁷⁶.

Therefore, although there is no specific regulation on influencer marketing from the perspective of the whole ASEAN. That the ASEAN countries do not support the operation mode of online influencers' hidden advertisement can be discovered from the perspective of ASEAN policy interpretation. Because the misleading and false nature of hidden advertisement is the opposite of accuracy and clarity.

3.5.2. Consumer Protection Regulations Related to Hidden Advertisement in the ASEAN Member States

When comparing the consumer protection laws of the ten ASEAN countries, there are still differences in the degree and scope of protection in each country²⁷⁷. However, misleading advertising and unfair practices related to hidden advertising are of concern throughout the ASEAN countries²⁷⁸.

3.5.2.1. The False and Misleading Advertisement in the Philippines, Malaysia, Thailand, Vietnam, and Lao People's Democratic Republic

Although there are no regulations directly applicable to hidden advertisement at the ASEAN level, starting from the domestic laws of ASEAN member states, the provisions governing false and misleading advertisement in the domestic laws of ASEAN member states can indirectly demonstrate the misleading and concealment of

²⁷⁶ ASEAN. "ASEAN Committee on Consumer Protection (ACCP) - Regional Cooperation In ASEAN". Available at <https://aseanconsumer.org/cterms-regional-cooperation-in-asean/asean-committee-on-consumer-protection-accp>. (Accessed 14/9/2022).

²⁷⁷ See Footnote 272 above.

²⁷⁸ See Footnote 272 above, p.4.

hidden advertisement is regulated at the domestic level. The situations in the Philippines, Malaysia, Thailand, Vietnam, and the Lao People's Democratic Republic (hereinafter, "the Lao PDR") are very similar. There is no domestic law directly applicable to online influencers' hidden advertisement. However, from the perspective of misleading nature of hidden advertisement, the domestic laws of the above five countries all have regulation on false and misleading advertisements.

In the Philippines, the principal law for consumer protection in the Philippines is the Consumer Act 1992 (Republic Act No. 7394, hereinafter, "the RA 7394"), where the RA 7394 covers a wide range of areas, which includes deceptive, unfair, and unconscionable sales acts and promises²⁷⁹.

Another example is Malaysia. The principal law for consumer protection in Malaysia is the Consumer Protection Act 1999. The Consumer Protection Act 1999 in Malaysia covers almost every aspect of consumer protection, including misleading and deceptive conducts, false representation, and unfair practices as well²⁸⁰.

As for the consumer protection in Thailand, the principal law is the Consumer Protection Act B.E. 2522 (1979)²⁸¹. The Consumer Protection Act has been revised several times, most recently in 2019, to provide comprehensive protection for Thai consumers²⁸². The section 22 and 23 of the Consumer Protection Act B.E. 2522 (1979) shows the consumer protection in advertising.

²⁷⁹ See Footnote 272 above, p.42.

²⁸⁰ See Footnote 272 above, p.33.

²⁸¹ See Footnote 273 above, p.67.

²⁸² See Footnote 273 above, p.67.

"Section 22. An advertisement shall not contain any statement which is unfair to consumers or any statement which may produce adverse effects on society at large, be it a statement as to origins, conditions, qualities or characteristics of goods or services as well as the delivery, procurement or use of goods or services.

The following statements are deemed to be statements which are unfair to consumers or statements which may produce adverse effects on society at large:

(1) a false or exaggerative statement;

(2) a statement causing fundamental misunderstanding as to the goods or services, whether it is made through the use or reference to technical reports, statistics or anything which is false or exaggerative or not; ...²⁸³

Section 22 of the Consumer Protection Act B.E. 2522 (1979) provides that such advertising is prohibited if there is a false or exaggerative statement on the condition of the product or service, including the characteristics. The promotion method of hidden advertisement does not focus on the quality of the product or service, but mainly on the particularity of the product, that is, the endorsement of influencers. The endorsement of influencers gives certain hints to the promoted product, which implies consumers that the product or service is worth buying. Such given hints seem to be the characteristics of the product or service. Therefore, this kind of false representation that misleads consumers' decision might be regulated by Section 22 to

²⁸³ Consumer Protection Act B.E.2522 (1979), Section 22. Available at http://web.krisdika.go.th/data/document/ext809/809789_0001.pdf (Accessed 14/9/2022).

a certain extent.

"Section 23. An advertisement shall not be conducted by any means which may be harmful to health or cause physical or mental harm or which may cause disturbances to consumers, as provided in the Ministerial Regulation."²⁸⁴

Section 23 of the Consumer Protection Act B.E. 2522 (1979) provides that any advertisements that cause physical or mental harm to consumers or cause disturbances are prohibited. Although Section 23 seems to be able to indirectly regulate hidden advertising, based on the operation mode of hidden advertisement, how to prove hidden advertisement caused mental damage to consumers or caused disturbances to consumers is abstract. Although hidden advertising may not cause physical harm to consumers, it may still violate the trust of consumers and potentially cause mental harm. Nevertheless, it may be too abstract and not concrete for consumers to justify this kind of mental harm. Although hidden advertising may disturb with consumers' consumption choices, it is difficult to use Section 23 to regulate hidden advertisement in practice. Because consumers need to prove such mental damage or disturbances to substantiate their claims. Therefore, Section 23 might regulate hidden advertising to a certain extent, but more legal instruments and interpretations are needed to support or guide consumers how to collect evidence to prove their mental damage or disturbances.

In Thailand's Consumer Protection Act (No. 4) B.E. 2562 (2019)²⁸⁵, Section 47 provides that:

²⁸⁴ Consumer Protection Act B.E.2522 (1979), Section 23.

²⁸⁵ Consumer Protection Act (No. 4) B.E. 2562 (2019) Available at https://www.aseanconsumer.org/file/pdf_file/consumer%20protection%20act%20no.4.pdf (Accessed 25/8/2022).

"Any person who, with the intent to cause misunderstanding as to the origin, condition, quality or quantity of, or other essential matters concerning, his own or any other person's goods or services, performs an advertisement or uses a label containing statement which is false or a statement which is known or ought to be known to possibly cause such misunderstanding shall be liable to imprisonment for a term not exceeding six months or to a fine not exceeding one hundred thousand Baht or to both."²⁸⁶

Section 47 states that statement which will cause misunderstanding in the quality and condition of the goods or services is prohibited. Section 47 also states that as long as a person causes misunderstanding about "essential matters", that person will be liable to imprisonment and fine. Nevertheless, for the definition and scope of "essential matters", Consumer Protection Act (No. 4) B.E. 2562 (2019) does not offer further explanation. From the perspective of hidden advertisement, whether the commercial connection between influencers and advertisers or brands is an essential matter that may cause misunderstanding under Section 47 requires more evidence to prove. Nevertheless, Section 47 generally shows that the Thai consumer protection law prohibits statements, advertisements and labels that cause consumers to misunderstand important attributes of the products or services.

Although the above laws and provisions in Thailand can indirectly regulate hidden advertisement, whether these laws of general advertisements can be applicable to extended online advertisements requires more proof. There is an argument showing that the online advertising is not covered by the existing advertising regulations in

²⁸⁶ Consumer Protection Act (No. 4) B.E. 2562 (2019), Section 47.

Thailand²⁸⁷. Moreover, some scholars hold that the current Thai consumer protection law in many versions is inappropriate because they have not been specifically constructed applicable to digital content's consumers which may cause injustice to the consumers²⁸⁸. Therefore, if the above laws and regulations are to be applied to regulate online influencers' hidden advertisement, it is necessary to revise existing laws or issue new legal interpretation instruments to prove the provisions of general advertising can be used to regulate hidden advertising.

The law that is closely related to hidden advertising in Vietnam may be Vietnam's Consumer Protection Law 2010, which has a section on unfair practices and misleading advertisements. Although Consumer Protection Law 2010 does not provide a general definition of unfair practices against consumers, it provides for a list of prohibited practices with certain elements of "unfairness", which is explained in Article 10 and the following provisions:

"Article 10. Prohibited behaviors

1. Attempt of organizations or individuals trading goods and/or services in deceiving or misleading consumers via advertising activities, or hide or provide information that is incomplete, false or inaccurate about one of the following details:

...

²⁸⁷ Torpanyacharn, Keovalin. 2021. "Development of Legal Measures to Regulate Online Advertising of High Fat, Sugar or Sodium Foods and Beverages for Protecting Children and Youth". *International Journal of Crime, Law and Social Issues* 8 (2): 21-32.

²⁸⁸ Treesomphong, Sakunphong, and Bajrawan Nuchprayool. 2021. "การพัฒนากฎหมายคุ้มครองผู้บริโภคเกี่ยวกับเนื้อหาดิจิทัล (The Development of Consumer Protection Law on Digital Content)". *Rajapark Journal* 15 (41): 27.

*c) The contents and characteristics of transaction between consumers and organizations or individuals trading goods and/or services.*²⁸⁹

In this Article 10, Vietnam's consumer protection law directly prohibits hiding or providing incomplete, false or inaccurate information. However, the specific meaning and scope of the meaning of "information" are not specified in Consumer Protection Law 2010. Therefore, it remains to be considered whether the commercial intent between influencers and advertisers or brands to promote products can be considered as "information". Nevertheless, at least the act of "hiding information" is illegal under the Consumer Protection Law 2010. Therefore, once the commercial connection or intention of influencers and advertisers or brands is identified as "information", then hidden advertising could be regulated by Article 10.

The Consumer Protection Law passed by the National Assembly of Lao PDR stipulates that misleading advertisement must be conducted in accordance with the principles that the context of the advertisement must be correct, and sufficient information about the goods and services must be provided²⁹⁰. However, the Consumer Protection Law of Lao PDR does not specify the definition and scope of "sufficient information". Therefore, whether influencers and advertisers or brands should bear the obligation to disclose the commercial connection and intention between them cannot be imposed on them simply due to the stipulation of "the context of the advertisement must be correct and sufficient". The expanded

²⁸⁹ Law On Protection of Consumer Rights, 2010, Article 10. Available at [https://aseanconsumer.org/file/pdf_file/Vietnam%20Legislation%20-%20Law%20on%20Protection%20of%20Consumer%20\(english\).pdf](https://aseanconsumer.org/file/pdf_file/Vietnam%20Legislation%20-%20Law%20on%20Protection%20of%20Consumer%20(english).pdf). (Accessed 6/6/2022).

²⁹⁰ Law On Consumer Protection, Article 14. Available at https://aseanconsumer.org/file/pdf_file/Law%20on%20Consumer%20Protection%20-%20English.pdf. (Accessed 6/6/2022).

interpretation of "sufficient information" can increase the responsibilities and risks of influencers and advertisers or brands. Thus, in Laos, the disclosure of commercial connections and intentions between influencers and advertisers or brands is still an issue.

In conclusion, the Philippines, Malaysia, Thailand, Vietnam, and the Lao PDR all have general regulations that can indirectly regulate hidden advertisement. However, to apply these general regulations on false and misleading advertising to hidden advertising, more legal instruments and interpretations are needed to support such expanded application.

3.5.2.3. Regulations Involving Hidden Advertising in Singapore

Unlike the five ASEAN countries mentioned above, Singapore's domestic law has provisions directly applicable to false and misleading advertisements and consumer protection provisions that are more closely related to hidden advertisement. Part 2 Article 4 of the Consumer Protection (Fair Trading) Act (Cap. 52A, 2009 Rev. Ed.) (hereinafter, "the CPFTA") shows the scope and definition of unfair practice:

"It is an unfair practice for a supplier, in relation to a consumer transaction —

(a) to do or say anything, or omit to do or say anything, if as a result a consumer might reasonably be deceived or misled;

(b) to make a false claim;

(c) to take advantage of a consumer if the supplier knows or ought reasonably

to know that the consumer —

(i) is not in a position to protect his or her own interests;

or

(ii) is not reasonably able to understand the character, nature, language or effect of the transaction or any matter related to the transaction; or

(d) without limiting paragraphs (a), (b) and (c), to do anything specified in the Second Schedule."²⁹¹

Item 23 of the 27 specific unfair practices listed in the Second Schedule explains that omitting to provide a material fact to a consumer is an unfair practice as follows:

"Omitting to provide a material fact to a consumer, using small print to conceal a material fact from the consumer or misleading a consumer as to a material fact, in connection with the supply of goods or services."²⁹²

Although Article 4 of the CPFTA states that as long as the audience might reasonably be deceived or misled, it may be an unfair practice. The CPFTA is based on the results to determine whether it is an unfair practice. However, it is unknown whether the consideration of this result is made by the consumers themselves or the part who views the case.

Item 23 of the Second Schedule also presents an important concept "material fact". In the interpretation of Article 2, "material fact" means any information that a

²⁹¹ The Consumer Protection (Fair Trading) Act (Cap. 52A, 2009 Rev. Ed.) (CPFTA), Part 2 Article 4. Available at <https://sso.agc.gov.sg/Act/CPFTA2003?ProvIds=Sc2-#Sc2->. (Accessed 6/6/2022).

²⁹² The Consumer Protection (Fair Trading) Act (Cap. 52A, 2009 Rev. Ed.) (CPFTA), Second Schedule.

supplier knows or ought reasonably to know would affect the decision of a consumer to enter into a consumer transaction²⁹³.

The interpretation of the meaning of "material fact" and Article 4 indicate that any information that can influence a consumer's decision should be disclosed. The disclosure of commercial connections and intentions between influencers and advertisers or brands to promote goods or services will affect the audience's evaluation of the credibility of the influencer's endorsement. Therefore, disclosing commercial connections and intentions will also affect the audience's decision on products or services endorsed by influencers. Accordingly, in the context of the CPFTA, commercial connections between influencers and advertisers or brands to promote goods or services should be disclosed to consumers as a material fact.

Generally speaking, ASEAN has no direct regulations for online influencers' hidden advertisement, but most ASEAN countries have consumer protection regulations for false and misleading advertisements. Singapore's possible regulations for hidden advertisement are more detailed than most ASEAN countries. The Singapore CPFTA's requirement that material facts should be disclosed to consumers implies the impossibility of hidden advertising to conceal commercial connections between influencers and advertisers or brands. Because the CPFTA requires that any information that affects consumers' decisions should be disclosed to consumers.

In sum, few provisions directly relate to hidden advertising in the consumer protection laws of each ASEAN country, but the degree of protection against misleading advertising and unfair practices varies from country to country. It remains true that the deceptive, concealing, and misleading nature of hidden advertising is

²⁹³ The Consumer Protection (Fair Trading) Act (Cap. 52A, 2009 Rev. Ed.) (CPFTA), Part 1 Article 2.

prohibited in the consumer protection laws of each ASEAN country in terms of the principles and policy directions of the overall consumer protection system.

3.6. China

3.6.1. A Brief Introduction to the Legal System of China.

China is a civil law country. The source of law in mainland China is statutory law, which includes laws, administrative regulations, and local regulations. Among them, the Constitution is the highest legal basis for other legislative activities and has the highest legal effect. The legal status and legal effect of administrative regulations are second only to the constitution and laws, and higher than local regulations and departmental regulations. Laws are grouped into seven broad areas: constitution and constitution-related laws, civil and commercial laws, administrative laws, economic laws, social laws, criminal laws, and litigation and non-litigation procedure laws.

The National People's Congress of China and its Standing Committee have the legislative power to formulate laws. The State Council has the power to formulate administrative regulations, and the People's Congress of provinces, autonomous regions, and municipalities and their Standing Committee have the power to formulate local regulations.

3.6.2. State Administration for Market Regulation and Related Laws in China

The State Administration for Market Regulation (hereinafter, "the SAMR"), as the highest regulatory agency for the supervision of online advertising in China, has not directly reflected the specific work results of online advertising. On the contrary, China's online advertising market has experienced regulatory failures due to imperfect

regulatory frameworks²⁹⁴.

Judging from the actual situation of China's online advertising market, China's supervision model is still dominated by administrative agencies that are involved in market supervision and management, supplemented by industry self-regulations and social supervision²⁹⁵. The consumer protection laws related to the advertising market are not limited to the "The Law of The People's Republic of China on Protection of Consumer Rights and Interests", but also include the "Advertisements Law of the People's Republic of China"

3.6.2.1. The Law of the People's Republic of China on Protection of Consumer Rights and Interests

The Law of the People's Republic of China on the Protection of Consumer Rights and Interests (hereinafter, "the CCPL")²⁹⁶ was promulgated and implemented in October 1993. In October 2013, the National People's Congress revised the law.

Article 1 defines the purpose of the CCPL including the protection of the legitimate rights and interests of consumers²⁹⁷. The CCPL has a total of eight chapters, which stipulate the rights and obligations of consumers, dispute resolution,

²⁹⁴ Xi, Lin. 2017. "我国网络广告监管研究(Research On The Supervision Of Online Advertisement In China)". Ph.D., 吉林大学 (Jilin University). (Chinese language, translation by the author)

²⁹⁵ Ibid.

²⁹⁶ 中华人民共和国消费者权益保护法 (The Law of The People's Republic of China on Protection of Consumer Rights and Interests). Available at <https://flk.npc.gov.cn/detail2.html?MmM5MDImZGQ2NzhiZjE3OTAxNjc4YmY3NjcwNjA2ZWY%3D>. (Accessed 8/6/2022). (Chinese language, translation by the author).

²⁹⁷ 中华人民共和国消费者权益保护法, 第一条. (The Law of The People's Republic of China on Protection of Consumer Rights and Interests, Article 1). (Chinese language, translation by the author).

and related legal responsibilities. Nevertheless, the CCPL is quite broad in concept and scope.

Article 4 of the CCPL provides that in transactions, business operators and consumers shall adhere to the principles of free will, equality, fairness, and good faith²⁹⁸. Therefore, when interpreting the provisions of the CCPL, it should match these principles in Article 4. However, limited by the scope of "transactions", it remains to be considered whether the behavior of influencers and advertisers or brands promoting products or services can be included in "transactions". The CCPL also does not specifically explain the scope and meaning of "transactions".

However, Article 20 showed the provisions for promotions that

*"Business operators shall provide consumers with true and complete information on the quality, performance, use, and useful life, among others, of commodities or services; and shall not conduct any false or misleading promotion."*²⁹⁹

Article 20 provides that the principles under Article 4 may not only apply to the transaction between consumers and business operators but also business operators shall not have false or misleading promotions about products or services.

Article 45 also stipulates that

²⁹⁸ 中华人民共和国消费者权益保护法, 第四条. (The Law of The People's Republic of China on Protection of Consumer Rights and Interests, Article 4). (Chinese language, translation by the author).

²⁹⁹ 中华人民共和国消费者权益保护法, 第二十条. (The Law of The People's Republic of China on Protection of Consumer Rights and Interests, Article 20). (Chinese language, translation by the author).

"Consumers whose lawful rights and interests are infringed upon by business operators providing commodities or services by false advertising or any other means of false promotion may claim compensation from business operators. Consumers may request the competent administrative departments to punish advertising agents or publishers which engage in false advertising."³⁰⁰

Therefore, Article 45 shows the punishment for false advertising is not only limited to advertising agents but also has a deterrent effect on advertisement publishers. Although consumers can only claim compensation from the business operator, the advertisement publishers may also be subject to administrative penalties. Therefore, from the perspective of influencer marketing, advertisers and brands as business operators, publishing false advertisements will not only cause them to compensate consumers, but they may also receive administrative penalties at the same time. For groups such as influencers who actually post advertisements, they may face administrative penalties for being considered as advertisement publishers. Nevertheless, when the influencer only acts as the endorser of the product or service, but does not actually publish the promotion. In the case of advertisers or brands posting promotions on their social media, it seems likely that influencers are escaping the CCPL's regulation.

Although the CCPL has provisions that can be applied to false advertisements, it is unknown whether these provisions can be extended to online advertisements. Moreover, the CCPL's provisions on false advertising are still too broad and lack

³⁰⁰ 中华人民共和国消费者权益保护法, 第四十五条. (The Law of The People's Republic of China on Protection of Consumer Rights and Interests, Article 45). (Chinese language, translation by the author).

clarity, and it is unclear how helpful the CCPL can be in the legal practice of influencer marketing.

3.6.2.2. Advertising Law of the People's Republic of China

Compared with the CCPL, the Advertisements Law of the People's Republic of China (hereinafter, "the CAL")³⁰¹ is more detailed in terms of advertising regulations and has greater reference value for online advertising.

The entire CAL has 6 chapters, which stipulate the rules for the contents of advertising and conducts of advertising, including the administrative agency's supervision and administration of advertising and the related legal liability.

Article 2 explains the scope of application of the CAL:

*"This Law shall apply to commercial advertising activities in which commodity dealers or service providers directly or indirectly introduce, via certain media and in certain forms, goods or services marketed by them within the territory of the People's Republic of China."*³⁰²

Different from the consideration of whether "transaction" in Vietnam's Consumer Protection Law 2010 includes promotion, which is discussed in Part 3.5.2.1. of Chapter 3, the CAL expands the scope of advertising law to commercial advertising

³⁰¹ 中华人民共和国广告法 (Advertising Law of the People's Republic of China) Available at <http://www.npc.gov.cn/npc/c12435/201811/c10c8b8f625c4a6ea2739e3f20191e32.shtml>. (Accessed 11/8/2022). (Chinese language, translation by the author).

³⁰² 中华人民共和国广告法, 第二条. (Advertising Law of the People's Republic of China, Article 2). (Chinese language, translation by the author).

activities. Thus, as long as it involves commercial advertising, it can be regulated by the CAL, which of course also includes commercial promotion. If the provisions in the previous part of Article 2 were not clear enough, the rest of Article 2's interpretation of "advertiser" and "endorser" makes it clearer that influencers and advertisers or brands are regulated by the CAL:

"For the purposes of this Law, "advertiser" means a natural person, a legal person, or any other organization that designs, produces, and publishes advertisements or authorizes any other person to do so for the purpose of marketing its goods or services.

...

For the purposes of this Law, "endorser" means a natural person, a legal person, or any other organization, other than the advertiser, that recommends or certifies goods or services in an advertisement in its own name or image."³⁰³

The interpretation of article 2 clearly shows that the regulated subjects of advertising law include not only advertisers or brands, but also influencers who endorse products or services, but the title of influencers has become "endorser". However, the behavior of endorsers is limited to "recommended" products or services, and "recommendation" seems to imply that endorsers need to actively express promotional behaviors or words.

³⁰³ 中华人民共和国广告法，第二条. (Advertising Law of the People's Republic of China, Article 2). (Chinese language, translation by the author).

Nevertheless, in The Coldest Water case in Part 3.1.3.2. of Chapter 3, the influencers just put the promoted product in the prominent position of the video without making any verbal evaluation, and the advertiser just takes advantage of the endorsement of the influencers. If the endorsement is extended to the scope of "recommend" in Article 2 of the CAL, such extension may be flawed.

For the question of whether online advertisement can be applied to the CAL, article 44 gives regulations that

"Advertising activities conducted over the Internet shall be governed by all the provisions of this Law."³⁰⁴

Thus, "Advertising activities conducted over the Internet" in Article 44 shows that the CAL is applicable to online advertising.

Other regulations related to influencer marketing include:

"Article 4 Advertisements shall not have any false or misleading content or defraud or mislead consumers."³⁰⁵

Article 28 may apply to situations where influencers promote paid products but mislead or deceive consumers that they are not sponsored by advertisers or brands:

³⁰⁴ 中华人民共和国广告法, 第四十四条. (Advertising Law of the People's Republic of China, Article 44). (Chinese language, translation by the author).

³⁰⁵ 中华人民共和国广告法, 第四条. (Advertising Law of the People's Republic of China, Article 4). (Chinese language, translation by the author).

"Article 28 Any advertisement that defrauds or misleads consumers with any false or misleading content shall be a false advertisement.

An advertisement that falls under any of the following circumstances shall be a false advertisement:

(1) The advertised good or service does not exist.

(2) Regarding the good's performance, functions, place of production, uses, quality, specification, ingredient, price, producer, term of validity, sales condition, and honors received, among others, or the service's contents, provider, form, quality, price, sales condition, and honors received, among others, or any commitments, among others, made on the good or service, there is any inconsistency with the actual circumstances, which has a material impact on purchases.

(3) Any scientific research result, statistical data, investigation result, excerpt, quotation, or other information which is fabricated or forged or cannot be validated has been used as a certification material.

(4) The results of using the good or receiving the service are fabricated.

(5) Consumers are otherwise defrauded or misled with any false or misleading content."³⁰⁶

In the CAL, the provisions for false and misleading advertising are still limited to the promotion of the quality and condition of the product or service in the advertisement. Article 28(5) may provide provisions for false and misleading advertising caused by means of promotion in advertising. Nevertheless, whether the scope of Article 28(5) can be extended to hidden advertising still needs more evidence.

This is why Chinese scholars criticize the provisions of the Advertisements Law of the People's Republic of China as being too broad³⁰⁷. Some scholars believe that the regulatory framework for online advertising in China's advertising laws is not perfect³⁰⁸. The existing legal framework does not solve the specific problems of online advertising well³⁰⁹.

The latest legislative progress on online advertising is that the SAMR is drafting the "Measures for the Administration of Internet Advertising"³¹⁰, and the SAMR is

³⁰⁶ 中华人民共和国广告法, 第二十八条. (Advertising Law of the People's Republic of China, Article 28). (Chinese language, translation by the author).

³⁰⁷ Lin, Chengduo, and Yuping Yang. 2012. "网络广告监管法律问题研究(The Research Of Legal Issues Of Network Advertising Regulation)". 华北电力大学学报(社会科学版)(Journal Of North China Electric Power University(Social Sciences)) 5. (Chinese language, translation by the author).

³⁰⁸ Liu, Zhiyong. 2021. "网络广告的监管及建议(Regulation Of Online Advertising And Suggestions)". 新闻研究导刊(Journal Of News Research) 12 (24). (Chinese language, translation by the author)

³⁰⁹ See Footnote 294 above.

³¹⁰ 中华人民共和国司法部(The Ministry Of Justice Of The People's Republic Of China). 2021. "市场监管总局关于征求《互联网广告管理办法(公开征求意见稿)》意见的通知(Notice Of The State Administration For Market Regulation On Consulting Opinions On "Measures For The Administration Of Internet Advertising (Draft For Public Opinion))". Available at

currently soliciting public opinions on the drafting of Measures for the Administration of Internet Advertising. Under the draft of Measures for the Administration of Internet Advertising, where hidden advertising may have a direct impact is Article 8:

"Internet advertisements should be identifiable, enabling consumers to identify them as advertisements.

Through the Internet media, in the form of bidding rankings, news reports, experience sharing, consumer reviews, or other forms of additional shopping links to promote goods or services, should be prominently marked 'advertisement'.³¹¹

The first paragraph of Article 8 can be a provision for hidden advertising. The second paragraph exemplifies that the form of "experience sharing" needs to be marked as "advertising". Then, the behavior of influencers promoting paid products or services in the name of sharing should be accompanied by the mark "advertising". Accordingly, the promotion intention of online influencers' hidden advertisement will be known by consumers through the "advertising" mark.

Although the future introduction of Measures for the Administration of Internet Advertising will strengthen the legal supervision of online advertising to a certain extent. However, how to implement these regulations into practice and the specific responsibilities of relevant subjects still need to be clarified by the legislature or administrative agency.

http://www.moj.gov.cn/pub/sfbgw/lfyjzj/lflfyjzj/202111/t20211129_442611.html. (Accessed 11/8/2022). (Chinese language, translation by the author).

³¹¹ Ibid.

3.6.3. Self-regulatory Organizations in China

In China, there are scholars have suggested that an industry self-regulatory framework should be established to strengthen the supervision of companies in the online advertising market³¹². In China, the current self-regulatory organization of the advertising industry is mainly the China Consumer Association (hereinafter, "the CCA"). In different provinces, there are also branches of the China Consumers Association. Apart from the CCA as a self-regulatory organization for consumer protection, the China Advertising Association (hereinafter, "the CAA") is a self-regulatory organization for the advertising industry.

Nevertheless, those two self-regulatory bodies are widely regarded as having a certain official character. Thus, some scholars believe that the CCA and the CAA lack independence, and it is difficult to truly realize self-regulation and management of the industry³¹³.

Thinking from another angle, the self-regulations and rules issued by those two institutions are more authoritative than general self-regulations for the industry. In fact, the contents of self-regulations issued by those two organizations are not much different from the CCPL or the CAL. The contents do not play the role of self-regulation that should bridge or fill the legal gap. For example, in the "Self-Regulation of the China Advertising Association"³¹⁴ issued by the CAA, only Article

³¹² Zhang, Meng. 2011. "论网络广告的法律规制(Discussion On The Legal Regulation Of Online Advertising)". 法制与社会(Legal System And Society) 2011 (07): 274-275. doi:10.19387/j.cnki.1009-0592.2011.21.152. (Chinese language, translation by the author).

³¹³ See Footnote 294 above, p.74.

³¹⁴ 中国广告协会(China Advertising Association). "中国广告协会自律规则(Self-Regulation Of The China Advertising Association)". Available at <http://www.china-caa.org/cnaa/showinfo/zlgz1>. (Accessed 11/8/2022). (Chinese language, translation by the author)

7 has provisions concerning false and misleading advertising:

*"False and misleading advertising is prohibited, nor should the nature of the goods or services be incompletely advertised."*³¹⁵

Plus, the CAA does not have any additional explanations or rules regarding the classification of false and misleading advertising and what kind of advertising behaviors in online advertising may be judged as false and misleading advertising.

For those reasons, scholars believe that the self-regulatory organizations have not really kept up with the needs of the development of online advertising, and there is still a great deal of incompatibility in the performance of online advertising regulations.

In general, there is still a lot of room for improvement in China's legal framework of online advertisement, and it becomes quite difficult to apply the current Chinese laws to solve the more specific problem of online influencers' hidden advertisement. Because the industry self-regulations lack their functions related to the online advertisement in China, it is also difficult to seek the help of self-regulation outside the law.

³¹⁵ Ibid.

Chapter.4 Comparative Analysis and Proposed Solutions

As can be seen in the discussion in the previous chapter, the regulation of online influencers' hidden advertisement in various countries and regions is not sufficiently specific and detailed. It has been demonstrated that the problem lies in the limitations of the existing legal framework for the regulation of online advertisement. Certain countries such as the U.S. and the U.K. already have rich experiences and their regulations of influencer marketing update constantly. However, for countries or regions such as China and ASEAN that have not yet built a solid legal framework for online advertising, it is more difficult for them to discuss hidden advertising.

The purpose of this chapter is to analyze the findings in the previous chapters, and synthesize various threads of information into a systematic presentation of problems, causes of the problems, and a potential solution to the problems.

In the first part of this chapter, the author will discuss preliminary issues relating to the existing framework, mainly to classify and analyze the regulatory models of various countries and regions discussed in Chapter 3. In the second part, the author will discuss the legal difficulties and challenges encountered by the government and state agencies in the practice of regulating hidden advertisement, and will focus on analyzing and discussing the practical problems when there is a lack of legal basis. In the third part, the author will discuss the problems caused by self-regulatory regimes. In the fourth part, the author will try to summarize five points that the universal model should solve, based on the analysis of government and state agencies and industry self-regulatory organizations in the previous parts. In the fifth part, the author will propose a universal model of regulation, entitled the Triangle Model, which aims to

effectively regulate hidden advertisement on the basis of the previous discussion and analysis.

4.1. Preliminary Discussion: Categorization of the Domestic Landscapes of Online Hidden Advertisement Regulation

From the laws and self-regulatory systems of various countries and regions introduced in Chapter 3, the overall framework of regulating hidden advertising can be divided into three categories, namely (1) indirect regulation, there are no regulations directly regulating hidden advertising; (2) parallel regulation, both government law and self-regulation exist, but the government and self-regulatory organizations do not show much communication with each other; (3) cross regulation, both government law and self-regulation exist, and the government and self-regulatory organizations have exchanges and cooperation. Each category will be discussed in turn.

4.1.1. Indirect Regulation

First, in the case of indirect regulation, there are limitations in the governmental or regional regulatory framework for regulating hidden advertising, such as the absence of direct regulations and interpretations of online influencers' hidden advertisement, and the lack of self-regulation. In this case, the hidden advertisement can only be indirectly regulated by the government law on false and misleading advertising. This is the case in ASEAN and China.

For ASEAN, using the existing legal regulatory framework to regulate online influencers' hidden advertisement is quite complicated. The regulations on online advertisement in ASEAN countries have shown that the level of legal development in each country is different. Some countries, such as Laos, Vietnam, and Thailand, have

not yet explained the legitimacy of existing regulations on advertisements applied to online advertisements³¹⁶. The regulation of hidden advertisement may need to start with the regulation for false and misleading advertisement and online advertisement. Singapore stipulates that any information that will affect consumer decisions must be disclosed, and this regulation can be indirectly applied to the regulation of hidden advertisement³¹⁷. Laos requires "sufficient information" in advertisements need be provided to the audience, but Laos has not explained the scope and concept of "sufficient information" in more detail³¹⁸. Therefore, it can be seen ASEAN member states have different laws on online influencers' hidden advertisement, mainly limited to the laws and legal interpretation documents. However, from the perspective of ASEAN's overall policy on consumer protection, The ASEAN Strategic Action Plan on Consumer Protection (hereinafter, "the ASAPCP") and the ASEAN High-Level Principles (hereinafter, "the AHLPr"), as a whole, hope that consumers can obtain accurate, clear, and consistent information in ASEAN³¹⁹. Therefore, ASEAN countries need more legal basis and regulatory support to build the regulatory framework for hidden advertisement.

China's regulations of online influencers' hidden advertisement are still in the developmental stage. There is no direct provision for hidden advertisement in existing Chinese laws. However, the regulation of online advertisement is clearly included in the Advertisements Law of the People's Republic of China (hereinafter, "the CAL")³²⁰. Nevertheless, again, limited by the broadness of the law, the regulation of hidden

³¹⁶ See the discussion in Part 3.5.2.1. of Chapter 3.

³¹⁷ See the discussion in Part 3.5.2.2. of Chapter 3.

³¹⁸ See the discussion in Part 3.5.2.1. of Chapter 3.

³¹⁹ See the discussion in Part 3.5.1. of Chapter 3.

³²⁰ See the discussion in Part 3.6.2.2. of Chapter 3.

advertisement still needs to be discussed from the perspective of false and misleading. Moreover, the development of China's industry self-regulatory organizations also lacks independence³²¹. China's self-regulatory organizations do not play the role of social supervision in the interpretation of the law and supervision of the advertising market, as in the U.S. or the U.K. Generally speaking, China's regulation of online influencers' hidden advertisement has a legal basis for online advertising, but there is still a lack of more specific and direct law or legal interpretations when it comes to solving hidden advertisement, and China's self-regulatory organizations have not issued any relevant documents on hidden advertisement to guide influencers and advertisers or brands to disclose their commercial connections.

Both ASEAN and China lack direct legal regulations and interpretation documents for online influencers' hidden advertisement. In ASEAN and China, the possible way to regulate hidden advertisement is to indirectly implement the regulation of hidden advertising through regulations on false and misleading advertising. Moreover, this framework not only reflects the lack of legal basis, but also shows the lack of self-regulation. In this type of framework mode, the supplementary or interpretive role of self-regulatory organizations to the law is not shown, while self-regulations are important to guide influencers and advertisers or brands. The flaw in this model is the ambiguity of the law. The ambiguity is reflected in the application of the provisions on false and misleading advertising to regulate hidden advertising. It is necessary to first determine that the advertising law or consumer protection law includes the content of online advertisement, and then check applying provisions of false and misleading advertising to regulate hidden advertising whether it exceeds the original purpose of the law. None of these preconditions are reflected in the light regulatory framework.

³²¹ See the discussion in Part 3.6.3. of Chapter 3.

4.1.2. Parallel Regulation

Second, in the mode of parallel regulation, the self-regulations and interpretation documents will play a role of supplement. However, the communications and cooperation between self-regulatory organizations and the government are not obvious. The EU and Canada fall into the second case.

If the EU's Digital Services Act (hereinafter, "the DSA") becomes a reality, the regulation of online influencers' hidden advertisement will directly apply the DSA for enforcement. The EU could regulate hidden advertising without indirect reference to the interpretation of the law and the auxiliary power of self-regulatory organizations. In addition, the DSA could realize the legal provisions that the social media platform is also the object of supervision so that the regulation of online influencers' hidden advertisement has more social supervision power³²². Moreover, there are also regulations on hidden advertisement in the domestic self-regulatory organizations of EU member states. The regulations of these self-regulatory organizations can also add a layer of social supervision and law interpretation to the supervision of online advertising before the DSA is implemented.

Canada relies mainly on the Competition Act as a legal basis for enforcement. However, the Competition Act does not directly stipulate hidden advertisement. Instead, it is determined in the administrative interpretation document of the Canadian administrative regulatory agency the Competition Bureau that hidden advertisement is regulated by the Competition Act³²³. The Competition Bureau also explains the concept of "material connection" in the hidden advertisement³²⁴. Therefore, it is

³²² See the discussion in Part 3.3.1. of Chapter 3.

³²³ See the discussion in Part 3.4.2. of Chapter 3.

³²⁴ See the discussion in Part 3.4.2. and 3.4.3. of Chapter 3.

feasible for Canada to use the Competition Act to regulate hidden advertisement. Canada's definition of "material connection" is roughly the same as that of the U.S. and the U.K. and stipulates that the commercial connection between influencers and advertisers or brands needs to be disclosed to the audience. The self-regulatory organization in Canada is also advising influencers and advertisers or brands to take responsibility for the identification and disclosure of their advertisements.

The EU and Canada have similar regulatory frameworks, both focusing on the regulatory role of the government. The DSA of the EU incorporates the regulation of hidden advertisement into legal documents, which clearly shows that the EU is different from the supervision model of China and ASEAN. The EU wants to directly solve the problem of hidden advertisement at the legal level. Canada is at a similar level, because Canada's administrative agency Competition Bureau indicated in its publication that the Competition Act can be applied to hidden advertising. The regulation of hidden advertisement by self-regulatory organizations in the EU and Canada also makes it more like a supplementary tool to connect with the non-detailed and non-specific provisions in government laws. In this framework model, the power of government regulation is manifested, and the interpretive and complementary roles of self-regulatory organizations are also manifested. Nevertheless, the trend toward cooperation between self-regulatory organizations and governments to protect consumer rights has not been clearly reflected. The regulation of hidden advertisement by self-regulatory organizations and the government is more like two lines, and there is not much cooperation and communication between the two.

4.1.3. Cross Regulation

The third category is cross regulation, which is a combination of government law and self-regulation, self-regulation and government law work together to regulate

hidden advertisement. This mode of regulation relies in practice on the role of self-regulatory organizations and self-regulations. Self-regulatory organizations may investigate cases based on consumer complaints and may refer to government agencies for further investigation. Moreover, self-regulation of hidden advertisement will guide the practice of influencers and advertisers or brands. This is the case in the U.S. and the U.K.

From the laws and guidelines on the regulation of online influencers' hidden advertisement in the U.S. in Chapter 3, the author finds that the U.S. government and industry self-regulatory organizations have already imposed some regulations on online influencers' hidden advertising³²⁵. The administrative agency Federal Trade Commission (hereinafter, "the FTC") in the U.S. will use the rights granted by the Federal Trade Commission Act (hereinafter, "the FTCA") to interpret the legal concept of online influencers' hidden advertisement. For example, the FTC explained to the public the concept of "material connection", which is important in hidden advertising³²⁶. In addition to the support of laws and legal interpretations and guidance documents, there are also self-regulatory organizations in the U.S. that communicate well with administrative agencies, such as the Better Business Bureau (hereinafter, "the BBB"). The BBB can assist the FTC's investigation in the supervision of online influencers' hidden advertisement³²⁷. Although the self-regulatory organization in the U.S. can investigate the case, in order to allow the regulatory object to be punished by law, the self-regulatory organization will refer the case to the administrative regulatory agency. This makes up for the lack of the legally binding force of these self-regulatory organizations. However, the supervision of

³²⁵ See the discussion in Part 3.1.2. and 3.1.3. of Chapter 3.

³²⁶ See the discussion in Part 3.1.2. and 3.1.3. of Chapter 3.

³²⁷ See the discussion in Part 3.1.3.2. of Chapter 3.

online influencers' hidden advertisement in the United States is still criticized for being too dependent on the power of self-regulatory organizations³²⁸.

However, there is a problem of inconsistency between the actual regulatory object and the provisions in the guidance document as well. For example, the guidance documents issued by the FTC are aimed at influencers and advertisers or brands, but only advertisers or brands will be investigated in real practice³²⁹. Although there are certain limitations on the laws and self-regulations governing hidden advertisement in the U.S., on the whole, the regulations on hidden advertisement in the U.S. are relatively effective. Compared with other countries or regions, such as China, the regulation of online influencers' hidden advertisement in the U.S. has been much improved, and there are many experiences that other countries can learn from and refer to. In general, the cooperation between the U.S. administrative regulatory agency and self-regulatory organizations has enabled the legal interpretation documents and guidelines issued by the FTC to be better utilized.

For the U.K., the overall regulatory system for online influencers' hidden advertisement is roughly the same as that of the U.S., and it also tends to rely on self-regulatory organizations. Nevertheless, from the United Kingdom's regulations of online influencers' hidden advertisement, the cooperation between the administrative regulatory agency and self-regulatory organizations will be more obvious. The administrative regulatory agency Competition and Markets Authority (hereinafter, "the CMA") and self-regulatory organization the Committee of Advertising Practice (hereinafter, "the CAP") jointly published Influencers' Guide to Making Clear That Ads Are Ads (hereinafter, "the Guide") to regulate online influencers' hidden

³²⁸ See the discussion in Part 3.1.2.4. and 3.1.3.2. of Chapter 3.

³²⁹ See the discussion in Part 3.1.3.2. of Chapter 3.

advertisement. In the Guide, the U.K. also stipulates "material connection" to explain the important concepts in the hidden advertisement. Similar to the FTCA in the U.S., the U.K. also has corresponding document, the Consumer Protection from Unfair Trading Regulations 2008 (hereinafter, "the CPRs"), as a basis for law enforcement. The CMA will apply the CPRs and the U.K. Code of Non-broadcast Advertising and Direct & Promotional Marketing (hereinafter, "the CAP Code") issued by the self-regulatory organization CAP when investigating suspected online influencers' hidden advertisement cases. Nevertheless, in the same way, the U.K. also has the problem of inconsistent regulatory objects and regulations. For example, in the case of CMA's investigation of Social Chain, the subject of investigation is the brand, and the influencer who published the hidden advertisement only got the alert. On the whole, the regulatory framework for online influencers' hidden advertisement in the U.K. and the U.S. is roughly the same. Both use the law and self-regulatory organization guidelines as the basis and reference for law enforcement and use the power of administrative agencies and self-regulatory organizations to investigate and regulate hidden advertising.

In this framework model, both government laws and self-regulations play their roles, and they reflect each other as well. Government agencies have specific interpretation documents and guidance documents to guide the practice of influencers and advertisers or brands, and self-regulatory organizations not only have relevant self-regulations but also have close ties and cooperation with the government.

These three framework models can roughly reflect the current supervision status of hidden advertisement in various countries and regions. In the following chapters, the author will analyze and study more specific problems and challenges in hidden

advertising, and explains the limitations and experiences that various countries and regions have in regulating hidden advertisement.

4.2. Issues Relating to the Legal and Regulatory Regime of the Government and State Agencies

The government's function of managing the economy, or the function of business administration in the general sense, is an important guarantee for achieving effective government intervention in the market economy in the context of online advertisement³³⁰. The increasingly complex online activities force state agencies to develop new governance models. However, the administrative body that currently regulates online advertising is also responsible for the regulation of other markets. Therefore, in this part, the author will discuss the law enforcement functions of government administrative agencies and administrative agencies' legal interpretations, and finally examine the defects and challenges of the legal regulatory framework in regulating hidden advertisement at the national government level.

The FTC in the U.S. and the CMA in the U.K., both of them are important administrative agencies in their countries for the protection of unfair competition and consumer rights as a whole. Nevertheless, they don't just deal with online advertising, they also have to be aware of the economic risks in other areas of the market. This is why the CMA does not accept individual complaints because of limited resources³³¹. In China, for example, the reasons for the difficulties in regulating online advertising include the fact that market regulators are often overwhelmed and the main

³³⁰ See Footnote 294 above.

³³¹ See Footnote 180 above.

responsibility for regulation is difficult to implement effectively³³².

The implementation of government functions needs to be based on law, but the legal basis for online advertisement varies from country to country. Ultimately, the lack of regulation of online influencers' hidden advertisement is due to the lack of legal regulation of online advertising.

4.2.1. The Lack of Legal Basis

In this section, the author will introduce two common problems and challenges encountered in regulating hidden advertisement related to the lack of legal basis. Namely: the difficulties in the interpretation of the law and the lag of the law. Both aspects reflect that the lack or ambiguity of the relevant content in the law, and will likely lead to the questioning of the legality of the application of the law.

4.2.1.1. Difficulties in the Interpretation of the Law

The major difficulty of the interpretation of the law in the context of online hidden advertisement is that in countries or regions that do not have directly applicable law or regulation on hidden advertising. Instead, they might resort to laws on false and misleading advertising to regulate hidden advertising. This leads to a legality problem regarding the expansion of legal liabilities of influencers and advertisers or brands without a proper legal basis.

Interpretation of the law can help fill in the gaps in the law in terms of developing and improving the legislation. This makes the application of the law

³³² Wang, Qiumei. 2020. "我国网络广告监管的法律问题研究(Research On The Legal Problems Of China's Internet Advertising Supervision)". Postgraduate, 山东政法学院(Shandong University of Political Science and Law). (Chinese language, translation by the author)

smoother. The necessity of the interpretation of law is reflected in the fact that legal interpretation is conducive to the realization of the purpose of the legislation and the social effect of law; it can help to overcome the mechanical application of law and guarantee the accurate application of the law; it can help to guarantee the reasonable expectation of public's behavior and realize the stability of law³³³. Therefore, the reasonable interpretation of the law relating to hidden advertisement can better provide a legal basis and legitimacy for regulating hidden advertising.

Any interpretation concerns the legal language and is an interpretation of a norm related to other norms within a legal system³³⁴. The core of interpretation is also the text itself and the legal community's perceptions of how to understand it³³⁵. The premise of applying laws prohibiting false and misleading advertisements to online influencers' hidden advertisement is that these laws and regulations can be applied to online advertisements.

Expanding the scope of the term “advertisement”, which originally refers only to traditional kinds of advertisement, to online advertisement is an attempt to expand the definition of the term. However, it remains to be considered whether this expansive approach to interpretation is legitimate, since there are a number of potential problems. Firstly, the interpretation of law cannot ignore the intent of the drafters of the law. There are limitations to the interpretation of the law. For example, in Thailand, Section 4 of the Civil and Commercial Code states:

³³³ Wang, Limin. 2014. "论法律解释之必要性(The Necessity Of Legal Interpretation)". 中国法律评论 (China Law Review) 6 (2): 87-98. (Chinese language, translation by the author)

³³⁴ Wróblewski, Jerzy. 1985. "Legal Language and Legal Interpretation". Law And Philosophy 4 (2): 239-255. doi:10.2307/3504672.

³³⁵ Barak, Aharon, and Sari Bashi. 2007. Purposive Interpretation in Law. Princeton University Press, 58.

*"The law must be applied in all cases which come within the letter and spirit of any of its provisions. Whereas no provision is applicable, the case shall be decided according to the local custom. If there is no such custom, the case shall be decided by analogy to the provision most nearly applicable, and, in default of such provision, by the general principles of law."*³³⁶

This provides that when interpreting the law, there are potential limitations to the extent and direction of interpretation. Therefore, applying the provisions involving false and misleading advertising to online influencers' hidden advertising might expand the liabilities of influencers and advertisers or brands too widely beyond the letter and the spirit of the law. This expansive interpretation requires influencers and advertisers or brands to avoid false and misleading advertising for their promotion on online social media. The expanded liability of influencers and advertisers or brands to make their advertising more compliant is beneficial for consumers, but for influencers and advertisers or brands, the expanded liability will limit their advertising language and behavior, which is more troublesome.

Secondly, this aggravates the promotion speech restrictions of influencers and advertisers or brands. Restrictions on civic behavior cannot be accomplished by reasoning alone, but require detailed legal provisions or instruments. Moreover, as many Thai scholars argue that the existing Thai advertising regulations do not include online advertising³³⁷, it may be unreasonable to blindly apply the general provisions of false and misleading advertising to hidden advertising. Therefore, the restriction on

³³⁶ Civil and Commercial Code, Section 4. (Thai language, English translation provided by the book "The Civil and Commercial Code – Translated Thai – English Updated B.E.2564", which is published by Soutpaisal Press).

³³⁷ See the discussion in Part 3.5.2.1. of Chapter 3.

the behavior of influencers and advertisers or brands requires more detailed and specific regulations to complete. Requiring influencers and advertisers or brands to take liability for disclosure of material connections can be done by amending the law or adding relevant legal interpretations. In addition, Canada's Competition Bureau issued the publication stating that the Competition Act can be applied to hidden advertising, which proves that legal documents are needed to expand the restrictions on influencers and advertisers or brands to regulate hidden advertising.

Accordingly, the application of the law of false and misleading advertising to the trial or investigation of hidden advertising related cases may fall into the dilemma of lack of legal basis. The inclusion of online advertising in advertising requires legal interpretation and connection. The lack of detailed legal interpretation and the directly using of the law on false and misleading advertising to regulate the hidden advertising will cause relevant influencers and advertisers or brands to question the legality of the application of the law. This is also why after China included online advertisement in the scope of advertising regulation, there are still calls for advertising to introduce more explanations about online false and misleading advertising³³⁸. It can clearly be seen that detailed explanation of the wording of the law and its scope is urgently required in order to establish effective regulation, and to avoid the problem of expansive and inconsistent interpretation of existing laws.

4.2.1.2. The Lag of the Law

Every demand for law reform is a recognition that law has come to diverge from

³³⁸ Dou, Honghao. 2022. "我国互联网虚假广告法律规制研究(Research On The Legal Regulation Of Internet False Advertising In China)". Postgraduate, 安徽财经大学(Anhui University of Finance and Economics). (Chinese language, translation by the author).

society³³⁹. The creation of law lags behind the development of society because the law is limited when it comes to predicting the situation of making a certain law, but society is rapidly evolving. The existing law may not fit the new situation, which is the lag of the law. The existing regulation of online advertisement may not be applicable to the new influencer marketing. Or more broadly, the existing consumer protection regulations for traditional advertising may not be fully applicable to online advertising. This is the specific lag of law regarding online influencers' hidden advertisement.

The lag of law for false and misleading advertising is also reflected in the discussion in Chapter 3. For example, Vietnam's Consumer Protection Law 2010 prohibits incomplete, false or inaccurate information while protecting consumer rights.³⁴⁰ Nevertheless, this is a law from 2010 that has not been amended in 12 years. The level of advertising development 12 years ago is definitely far from what it is now. Such a lag of law may have more incompatibility and difficulty in regulating existing emerging advertising technologies.

Another example is that the requirements for advertising to be recognizable and clear are not specific due to the lag of law. The FTC's explanation of "material connection" in the Guides Concerning the Use of Endorsements and Testimonials in Advertising (hereinafter, "the Endorsement Guides") and .com Disclosures: How to Make Effective Disclosures in Digital Advertising (hereinafter, "the .com Disclosure") shows the fact that "material connection" is an important factor in regulating online influencers' hidden advertisement. Because hidden advertising is the promotion of paid products or services based on the "material connection" between influencers and

³³⁹ Watson, Alan. 1977. *Society and Legal Change*. Edinburgh: Scottish Academic Press, 132.

³⁴⁰ See the discussion in Part 3.5.2.1. of Chapter 3.

advertisers or brands. Hidden advertisement is the product of the undisclosed "material connection" between influencers and advertisers or brands. Therefore, it is vital and necessary to define the commercial connection between influencers and advertisers or brands.

Similar definitions of "material connection" by the FTC can be found in the Guide³⁴¹ in the U.K. and the Advertising Code for Social Media & Influencer Marketing 2019 (hereinafter, "the RSM")³⁴² in the Netherlands. This proves that the relationship between influencers and advertisers or brands for monetary payments or free products or discounts or other benefits is crucial for consumers. Moreover, this material information affects how consumers evaluate the credibility of influencers' endorsements. In reality, however, there are also countries, such as Singapore, which have insufficient interpretation and definition of this important information. Singapore explains in the Second Schedule Item 23 of the Consumer Protection (Fair Trading) Act (Cap. 52A, 2009 Rev. Ed.) (hereinafter, "the CPFTA") that omitting to provide a material fact to a consumer is an unfair practice³⁴³. Nevertheless, for the explanation of "material fact", the CPFTA only gives two examples in Item 23, "using small print to conceal a material fact from the consumer" and "misleading a consumer as to a material fact"³⁴⁴. Nevertheless, the CPFTA did not specify what kind of fact can be called "material". The "material" fact in online influencers' hidden advertisement is the factor that allows the audience to clearly identify "this is an advertisement".

In fact, the essence of the United States' and United Kingdom's pursuit of

³⁴¹ See footnote 187 above.

³⁴² See Footnote 251 above.

³⁴³ See the discussion in Part 3.5.2.3. of Chapter 3.

³⁴⁴ See the discussion in Part 3.5.2.3. of Chapter 3.

"material connection" disclosure is that the advertisement is clear and recognizable when it is contacted by the audience. The United States' "the clear and conspicuous requirement"³⁴⁵, the United Kingdom's requirement that advertisements be identifiable and "clear/obvious"³⁴⁶, and the EU's empowering the audience the right to "see very 'clearly' when content is sponsored"³⁴⁷ all reflect the specific requirements and actions of regulatory bodies to make advertisements clear and recognizable. However, the laws of some countries are still lacking in the specific requirements for the recognizability of advertisements when regulating advertising. Such interpretations and guidance on how to make advertising clear and identifiable are missing from China's and ASEAN member states' domestic laws or administrative documents.

It is arguably insufficient to simply stipulate that "internet advertisements should be identifiable, enabling consumers to identify them as advertisements"³⁴⁸ in the advertising law. Especially in a statutory law country such as China, the reliance on the law and legal interpretations will be more obvious than that in a case law country. Although China revised the CAL in 2021, the development of China's advertising market is quite rapid. Although the CAL solves the connection between advertisements and online advertisements, the broad regulations only aggravate the doubts and risks of practice because of the lack of detailed interpretations.

4.2.2. Challenges Posed by the Lack of Legal Basis

Due to the lack of legal basis, many practical problems and academic debates have arisen. In actual practice, neither the FTC nor the CMA is inclined to bring

³⁴⁵ See Footnote 79 above, p.6.

³⁴⁶ See Footnote 187 above, p.6.

³⁴⁷ See Footnote 227 above.

³⁴⁸ See Footnote 310 above.

lawsuits against advertisers or brands that publish online influencers' hidden advertisement. During the discussion of the FTC's functions and academic perspectives on the emergence of emerging advertising technologies, it may be clear why there are barriers to legal regulation and enforcement.

4.2.2.1. The Debate Over Commercial Speech and Free Speech

Influencers will use specific terms in hidden advertising to promote products or services, such as "my own daily used products". Therefore, the audience will think that this is a personal opinion a private speech of the influencers. The reason for online influencers' hidden advertisement is that influencers choose to hide their commercial connection with the advertiser or brand from the audience. This means that influencers choose to say something to the audience and to not say something else. Such conduct appears to be related to freedom of speech, or more specifically, freedom of commercial speech.

When it comes to freedom of commercial speech, especially freedom commercial of speech online, the public tends to think of its negative aspects, such as the abuse of extreme words, subjective evaluations of the product, and exaggerated sales figures. The U.S. was the earliest to explore freedom of speech in advertising³⁴⁹.

Before 1976, there was not much academic discussion of commercial speech, which was excluded from the protection of freedom of speech in the United States at that time³⁵⁰. Alexander Meiklejohn argues that commercial speech is irrelevant to the political process of the nation and should therefore be excluded from the protection of

³⁴⁹ Zhang, Yanyan. 2012. "美国的商业言论自由(Freedom Of Commercial Speech Of America)". Ph.D., 山东大学 (Shandong University) . p.4. (Chinese language, translation by the author).

³⁵⁰ Schultz, David. 2022. "Commercial Speech". Available at <https://mtsu.edu/first-amendment/article/900/commercial-speech>. (Accessed 13/8/2022).

the First Amendment³⁵¹. The views represented by Daniel Farber³⁵² and Edwin Baker³⁵³ believe that commercial speech (compared to political speech) is more similar to private goods, and even if constitutional protection is given, it can only be a lower degree of protection. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* (1976), the Supreme Court extended First Amendment free speech protection to commercial speech³⁵⁴. That is to say, the academic discussion on commercial speech in the U.S. has not stopped. Nevertheless, generally speaking, in the U.S. right now, commercial speech is a protected form of communication under the First Amendment, but it is not as protected by freedom of speech as non-commercial speech, such as political speech³⁵⁵.

However, in order to consider whether the speeches published by influencers are personal speeches or commercial speeches³⁵⁶, the author thinks that it is still necessary to rely on the consideration of whether there is a "material connection" between influencers and advertisers or brands. If there is a "material connection" between influencers and advertisers or brands, then the influencers' speech may fall within the scope of commercial speech. However, the falseness or misleadingness of hidden advertisement will make influencers' speech fall into the scope of false or misleading commercial speech. Moreover, human right aspects including freedom of

³⁵¹ Meiklejohn, Alexander. 1979. *Political Freedom: The Constitutional Powers of The People*. Greenwood Pub Group.

³⁵² Farber, Daniel. 1979. "Commercial Speech and First Amendment Theory". *Northwestern University Law Review* 74 (3): 372-408.

³⁵³ Baker, Edwin. 2009. "The First Amendment and Commercial Speech". *Indiana Law Journal* 84: 981-998.

³⁵⁴ *Va. Pharmacy Bd. v. Va. Consumer Council*, 425 U.S. 748 (1976). Available at <https://supreme.justia.com/cases/federal/us/425/748/>. (Accessed 13/8/2022).

³⁵⁵ See Footnote 350 above.

³⁵⁶ See Footnote 86 above.

information and access to accurate information should also be taken into account, to make a fair balance for both advertisement publishers and consumers.³⁵⁷

The prohibition of false and misleading advertising is generally regarded as a major social interest. The government's strict regulation of false and misleading advertising also constitutes the distinction between commercial and political freedom of speech under the First Amendment. The Supreme Court of the United States has held that false or misleading statements in commercial speech and proposals for illegal transactions can be prohibited³⁵⁸. Thus, it is not feasible for influencers and advertisers or brands to use commercial freedom of speech to make a false and misleading commercial speech. The protection of freedom of commercial speech does not affect the protection of commercial speech in influencer marketing, but freedom of speech does not protect false or misleading commercial speech. Then, the regulation of online influencers' hidden advertisement is not restricted by the viewpoint of freedom of commercial speech. Because of the false or misleading nature of the hidden advertisement, it has been excluded from the protection scope of freedom of speech.

4.2.2.2. Difficulties in Determining the Objects of Regulation

In terms of regulated objects, although both influencers and advertisers or brands are responsible for disclosing material information, punishments for hidden advertisement are often only aimed at advertisers or brands, and influencers may only

³⁵⁷ The issues of freedom of information and access to accurate information on the Internet are outside the scope of this thesis. See, for example, "*Ensuring Access to Accurate Information and Combatting Misinformation about Pandemics*" by Diane Orentlicher, and "*Freedom of Information beyond the Freedom of Information Act*" by David E. Pozen.

³⁵⁸ *Zauderer v. Office of Disc. Counsel*, 471 U.S. 626 (1985). Available at <https://supreme.justia.com/cases/federal/us/471/626/>. (Accessed 13/8/2022).

get a less severe warning. For example, in *The Coldest Water* case³⁵⁹ and *Social Chain* case³⁶⁰, the objects under investigation are only brands. In the operation mode of hidden advertisement, the relevant personnel include influencers, advertisers, brands, social media platforms, etc. Especially when the disclosure of "material connection" is made based on legal or administrative interpretation documents, it becomes unclear who should bear the responsibility for disclosure.

In practice, the Disclosures 101 for Social Media Influencers (hereinafter, "the Disclosure 101") issued by the FTC is aimed at influencers to guide them to disclose clearly and identifiably the "material connection" between them and advertisers or brands, and the FTC guides influencers to actively disclose³⁶¹. Nevertheless, in actual practice, when hidden advertisement occurs, the FTC often investigates and holds advertisers or brands accountable. For example, in *The Coldest Water* case, the FTC investigated *The Coldest Water Company* only. Nevertheless, the administrative agencies took no further action against the influencers involved in *The Coldest Water* case and the *Social Chain* case³⁶².

The FTC and the CMA guide influencers to disclose "material connections," but it is the advertisers or brands who are ultimately held accountable. Influencers often act as individuals in hidden advertising, but advertisers or brands act in the name of the company. Some scholars believe that it is because the companies hold more power in the business relationship that advertisers or brands are ultimately held

³⁵⁹ See the discussion in Part 3.1.3.2. of Chapter 3.

³⁶⁰ See the discussion in Part 3.2.4. of Chapter 3.

³⁶¹ See the discussion in Part 3.1.2.1. of Chapter 3.

³⁶² See the discussion in Part 3.1.3.2. and 3.2.4. of Chapter 3.

accountable³⁶³. Nevertheless, in the U.K. the CPRs' definition of "trader" already shows that the "trader" under the CPRs includes influencers and advertisers or brands³⁶⁴. Therefore, there is a legal basis for the influencers to be held accountable, but the CMA still chooses to only send a warning to the influencers. Then, Social Chain and its co-founders need to make a commitment to ensure that hidden advertising will never happen again. Penalties for inconsistencies between influencers and advertisers or brands will raise the question of whether the scope of regulation objects in the actual practice of online advertising is consistent with the legal provisions.

The identification of regulatory objects is also complicated by the emergence of new types of influencers in real life, namely virtual influencers. Due to the renewal of online influencers and the development of technology, a certain number of virtual influencers appeared on social media platforms. These virtual influencers may be computer-generated characters, who can be human, with realistic features, personalities and characteristics³⁶⁵, such as Lil Miquela³⁶⁶, and some virtual influencers are more cartoonish in nature³⁶⁷, such as Nobody Sausage³⁶⁸, so the

³⁶³ Luong, Ashley. 2020. "All That Glitters Is Gold: The Regulation Of Hidden Advertisements And Undisclosed Sponsorships In The World Of Beauty Social Media Influencers". *William & Mary Business Law Review* 11 (2): 580.

³⁶⁴ See the discussion in Part 3.2.3.1. of Chapter 3.

³⁶⁵ See Appendix 8.

³⁶⁶ Lil Miquela, or Miquela Sousa, is an American character who was created by Trevor McFedries and Sara DeCou. As a marketing tool, Miquela has been featured in product endorsements for streetwear and luxury brands such as Calvin Klein and Prada. As of July 10, 2022, Lil Miquela has over 3,042,000 followers on Instagram, for more detail see <https://www.instagram.com/lilmiquela/> (Accessed 10/7/2022).

³⁶⁷ See Appendix 9.

³⁶⁸ Nobody Sausage is a character animation developed by Kael. And Nobody Sausage is an advertising company that develops and produces digital content using animated "sausages" as the main star of such videos or campaigns. And as of July 10, 2022, Nobody Sausage has over 1.52 million followers on YouTube. For more

influencer itself may not be a real person. Therefore, the problem of virtual influencers leads to the question, can the original laws and regulations on influencers' behavior still be directly applicable to virtual influencers? The actual operator of virtual influencers may not only be an individual but also a business team. If virtual influencers publish false or misleading advertisements, the rationality of applying existing online advertising laws to regulate virtual influencers may require more legal support.

All in all, more legal support is needed to determine the regulatory objects under the existing online advertising legal framework and to carry out actual legal punishment.

4.2.2.3. Difficulties Relating to the Burden of Proof

Online advertisements are published on virtual network platforms, and the transmitted data is basically electronic data, which has great uncertainty. At the same time, electronic evidence is easy to be modified and forged, which makes the authenticity of electronic evidence doubtful. Accordingly, it is difficult to investigate and collect evidence for online influencers' hidden advertisement. The ease of modification of the network platform enables influencers to modify and delete online content at any time. Once the problem is discovered, the influencers can immediately delete the illegal content to remove the illegal evidence.

The process of determining whether the influencer's sharing belongs to commercial speech is actually the same as the process of determining whether a post's content belongs to hidden advertisement. Nevertheless, for consumers, the process of

details, see <http://nobodysausage.com/about-me/> and <https://www.youtube.com/c/nobodysausage> (Accessed 10/7/2022).

proving how they have been harmed by online advertising is difficult. China's burden of proof requires that the parties have the responsibility to collect or provide evidence for their claims and have the responsibility to use the evidence to prove that the facts of the case are true, otherwise they will bear the risk that their claims cannot be established. Therefore, once consumers discover hidden advertisement, consumers need to bear the corresponding burden of proof to prove the reality of hidden advertisement. If consumers bear the burden of proof, there may be difficulties when consumers need to submit evidence of the defendant's identity information to the court. Because in the lawsuit, it is necessary to clarify the identity information of the defendant, such as name and contact information, etc. In social media, the identities of influencers and advertisers or brands are often not public. Especially when facing the personal information of influencers, it is more difficult to obtain identity information, compared to obtaining the company's business information. Based on the uncertainty of the Internet, consumers do not have convenient channels to obtain private information.

However, the practical technical difficulties of network evidence collection undoubtedly increase the difficulty of consumer evidence collection. Moreover, considering the high cost of litigation, most consumers usually choose to give up the supervision of online advertising³⁶⁹. In case of a complaint, only the advertiser or both the influencer and advertiser are asked to defend themselves. An important question is how to prove that there is no "material connection" between influencers and advertisers or brands. When investigating a case involving hidden advertisement, it should be presumed that the burden of proof lies on the consumer, or the influencers and advertiser or brand.

³⁶⁹ See Footnote 294 above.

In China, because the burden of proof for online advertising rests on consumers, some scholars criticize China's imperfect burden of proof system for online advertising³⁷⁰. In the U.S., some scholars believe that it is difficult to prove what kind of "concrete harm"³⁷¹ consumers have suffered. However, some scholars believe that the FTC does not need to prove actual false or misleading intent when proving the deceptiveness of an advertisement³⁷².

Thus, it seems that there are different views in the academia on the discussion of the burden of proof for violations of online advertising. However, consumers, as a relatively disadvantaged party, need more legal support to prove that online advertising has damaged their rights and how can they evaluate the damage.

4.3. Legal Issues Relating to Self-regulatory Regimes

Self-regulatory regimes have a complementary role in bridging and supplementing the law where it is unclear or not detailed. Although self-regulations do not have the force of law, to a certain extent, they can regulate the behavior of influencers and advertisers or brands. Based on the communication between government agencies and self-regulatory regimes, self-regulatory regimes also have some authority and reference in the issue of regulating the hidden advertisement. Thus, self-regulations are an important part of the framework for regulating online influencers' hidden advertisement.

³⁷⁰ Zhou, Bowen. 2019. "论我国名人虚假代言的法律规制(Discussion On The Legal Regulation Of The False Endorsements Of Chinese Celebrities)". Postgraduate, 兰州大学(Lanzhou University). (Chinese language, translation by the author).

³⁷¹ Tokeley, Kate. 2021. "A Call for Radical Transparency: The Regulation Of Camouflaged Online Advertising". *Journal Of Law, Information & Science* 25 (2): 132.

³⁷² Bladow, Laura. 2018. "Worth the Click: Why Greater FTC Enforcement Is Needed To Curtail Deceptive Practices In Influencer Marketing". *William And Mary Law Review* 59 (3): 1135.

4.3.1. The Problem of Overlapping Roles of Self-regulatory Organizations and Government Agencies

After the discussion of Chapter 3, the author has divided the supervision modes of hidden advertisements in various countries and regions into three situations³⁷³. Among them, due to the different degrees of utilization of self-regulatory organizations in different countries or regions, there is a parallel regulation model that governmental laws lead the supervision and use self-regulation as a supplement³⁷⁴, and there is also a cross regulation model in which governmental laws and self-regulations work and cooperate together³⁷⁵. However, the above two regulatory models have certain drawbacks. In the parallel regulation model, the role of self-regulatory organizations does not play a large role, and it does not assist government agencies in impact on consumer protection by reducing the investigative burden. The other one might be criticized for the difficulty of law enforcement by government agencies. The problem presented in both cases is how to balance and adjust self-regulatory organizations and government agencies. The overlapping is reflected in how much authority government agencies should delegate to self-regulatory organizations, and to what extent the two should cooperate.

Self-regulation remains as the principal controlling device for a wide range of activities including advertising³⁷⁶. The establishment of self-regulatory organizations is conducive to the formation of industry standards and norms, can fill the gaps in legal supervision, and has a positive role in promoting the development of the

³⁷³ See the discussion in Part 4.1. of Chapter 4.

³⁷⁴ See the discussion in Part 4.1. of Chapter 4.

³⁷⁵ See the discussion in Part 4.1. of Chapter 4.

³⁷⁶ See Footnote 153 above, p.97.

industry, especially for emerging influencer marketing. Nevertheless, the extent to which self-regulation is used varies in many countries.

In the U.K., the Advertising Standards Authority (hereinafter, "the ASA") and the CAP have issued self-regulatory rules or guidelines to guide influencers and advertisers or brands in avoiding false or misleading advertising where the U.K. law has not been fully explained. The ASA and the CAP provide specific documents or guidance to enable influencers and advertisers or brands to understand how to enable audiences to clearly identify advertisements. Although these self-regulatory documents are not mandatory, they can reduce the risk that influencers and advertisers or brands may be exposed to.

In the U.S., the reliance on self-regulatory organizations can be reflected in some of its cases against online advertising from the BBB, a self-regulatory organization. The BBB investigates consumer complaints it receives and may report investigations to the FTC. The FTC can thus avoid the sheer amount of content to potentially monitor and analyze³⁷⁷. However, some scholars question that the reliance on self-regulatory organizations leads to the FTC's enforcement difficulty³⁷⁸.

China's supervision model for online advertising is more inclined toward state-led and without efficient self-regulation. It has also been criticized by scholars for the lack of independence of self-regulatory organizations³⁷⁹. It is believed that the supervision effect of China's online advertising self-regulatory organization is not

³⁷⁷ See Footnote 363 above, p.580.

³⁷⁸ See Footnote 363 above, p.580.

³⁷⁹ See Footnote 294 above, p.74.

ideal³⁸⁰.

Therefore, in the regulation of online advertisement, more consideration should be given to whether government agencies should delegate their supervisory power to private powers, and how much power should be delegated to self-regulatory organizations for governance.

The use of self-regulatory organizations in the U.S. and the U.K. to interpret limitations in the law reflects the function of self-regulatory organizations to fill the gap in online advertising supervision. This is what self-regulatory organizations dealing with online advertising should do. Although these self-regulatory documents are not mandatory, influencers, advertisers, and brands can reduce the risk by complying with self-regulation. The use of self-regulatory organizations to ease the burden of consumer protection on government agencies allows government agencies to optimize the use of resources. Nevertheless, over-reliance on self-regulatory organizations can also create enforcement difficulties for government agencies, which may then target companies rather than influencers³⁸¹. Accordingly, it is vital to balance the distribution of tasks between government agencies and self-regulatory organizations. If the relationship and cooperation between the two are balanced, government agencies and self-regulatory organizations can play a joint role in regulating hidden advertising. Then the functions of the two may also be more effective. Therefore, balance the cooperation between self-regulatory organizations and government agencies can optimize their regulatory functions, make self-

³⁸⁰ Ding, Guofeng, and Miao Jiang. 2022. "我国网络直播带货虚假宣传的法律规制——兼评《禁止网络不正当竞争行为规定（公开征求意见稿）》" (Legal Regulation of False Promotion of live streaming marketing in China- Discussion on the Provisions of The Prohibition Of Unfair Competition On The Internet (Draft For Public Opinion)). *中国流通经济*(China Business And Market), 11-21. (Chinese language, translation by the author).

³⁸¹ See Footnote 363 above, p.580.

regulatory organizations authoritative, and make government agencies more comprehensive in law enforcement.

4.3.2. Inadequate Use of the Supervising Power of Social Media Platforms

Social media has given every business, large and small, its own way of influencing its target consumers. The flow of information has never been greater, and every user is a potential recipient of information. There are legal risks associated with posting hidden advertisement on social media, but social media platforms publish rules for the user that hold the regulatory object to additional and stricter rules. The additional and stricter rules of social media platforms could curb or reduce the appearance of online advertisements that harm consumers' rights, which is the responsibility of social media platforms.

In the discussion of Chapter 3, the emergence of social media platforms is rarely seen in laws and regulations, but in the hidden advertisement, influencers are dependent on social media platforms. The EU's DSA gives consumers a right: the right to complain to the platform³⁸². This provides that the platform has to take on more responsibilities, at least in accepting consumer complaints.

The power of self-regulation of the network platform industry often comes from the network platform itself, rather than through the authority of government departments, and there is no legal right granted to the platform. In turn, there is a lack of powerful methods in the implementation of the network platform and the supervising process. If the DSA in the EU really empowers consumers to have the right to complain to the platform through relevant regulations in the future, then the law gives the platform the legitimacy of receiving consumer complaints and

³⁸² See Footnote 227 above.

investigating related complaints to a certain extent.

Considering the consumers' complaints to the platform from the perspective of hidden advertisement, if consumers can use their rights from a platform other than lawsuits and complaints to government regulators, this move will undoubtedly broaden the channels for consumers to use their rights. Considering the convenience of the platform to complain, consumers will not spend as much on a lawsuit. Then, consumers may not be deterred by the limited resources of law enforcement agencies that do not accept individual complaints. However, the number of online advertisements published by online platforms is huge every day, and the current technical capabilities of online platforms have not yet reached the level of effective inspection one by one. The technological lag may cause great difficulties in the active supervision of online advertising platforms.

However, the platform should implement an efficient complaint mechanism, so that consumers can have a channel to monitor possible violations on the platform, which will definitely help increase the effectiveness of the platform's supervision of online advertisements. Nevertheless, can platforms also become objects of regulation? In the U.S., there are scholars in the background of national security restrictions, taking TikTok as an example to analyze the possibility of establishing a regulatory framework for social media platforms³⁸³. The scholar believes that although the existing statutory framework is limited in the legal supervision of TikTok, the establishment of the TikTok regulatory framework can be improved through legislation³⁸⁴.

³⁸³ Sitaraman, Ganesh. 2021. "The Regulation Of Foreign Platforms". SSRN Electronic Journal, 1076-1151. doi:10.2139/ssrn.3870781.

³⁸⁴ Ibid.

Therefore, if the platform wants to have a good regulatory framework, or if the regulatory authority wants to assign some regulatory functions to the platform, or if the regulatory authority wants to impose supervision and restrictions on the platform, then amending the law or issuing legal interpretations is also an option to solve these problems.

4.4. Concluding Remarks on Challenges and Issues

In the preceding discussion, the author has discussed various issues and challenges under the existing regulatory framework. The author submits that the establishment of the regulatory framework for online influencers' hidden advertisement needs to solve the following five common problems identified in the previous part.

The first problem is the missing or incomplete legal interpretation of the commercial connection between advertisers or brands. From the regulatory experiences of hidden advertisement in the U.S. and the U.K., the pure financial relationship or personal relationship between influencers and advertisers or brands needs to be disclosed to the audience. Moreover, such commercial intent between influencers and advertisers or brands is categorized as a "material connection" in the U.S. and the U.K. For China and most ASEAN countries, the existing laws or self-regulatory documents lack the interpretation and definition of "material connection". This shows that enforcement agencies lack the necessary legal basis for determining what connections between influencers and advertisers or brands need to be disclosed to consumers. Accordingly, this ambiguity makes it difficult for enforcement agencies to examine and assess hidden advertisement for the purpose of regulation and enforcement.

Second, it is necessary to determine who to bear the burden of proof. Judging from the regulatory documents in the U.S. and the U.K., the regulatory objects in the U.S. and the U.K. are mainly aimed at influencers and advertisers or brands. However, in actual enforcement, the U.S. and the U.K. often only investigate advertisers or brands. The assumption of the burden of proof may lead to the outcome of the entire case. If the party who is responsible for the proof fails to provide evidence, the party has to face the risk of losing the case. In the case of consumer protection, the burden of proof should also be clarified, whether the consumer bears the burden of proof, or the supervision objects bear the burden of proof.

Third, the functional scope of the supervisory body needs to be clearly defined. The current regulatory model for online influencers' hidden advertisement in the U.S. and the U.K. relies to a certain extent on the power of self-regulatory organizations. The reliance on self-regulatory organizations to regulate online advertisements has been criticized for causing difficulties for the FTC's enforcement. The fact that the U.K. government supervision body, the CMA, does not accept individual complaints also shows the limitation of an exercise of consumer rights. Therefore, clarifying the functional scope of the government supervision body can help improve the enforcement and protect the channels of exercising consumer rights.

Fourth, the role of self-regulatory organizations is insufficient. Although there is a view that the United States' reliance on self-regulatory organizations renders the FTC enforcement difficult, the author submits that this does not prove that the role of self-regulatory organizations in interpreting the law and regulating influencers and advertisers or brands is unimportant or harmful. Administrative interference by Chinese government agencies in self-regulatory organizations also makes it difficult for self-regulatory organizations to function. For self-regulatory organizations, their

independence is also an important factor affecting their authority. Scholars' criticisms demonstrate that the cooperation between self-regulatory organizations and government agencies needs to be appropriate, that is, government agencies need to confirm how much power is delegated to self-regulatory organizations to regulate online advertisement.

Fifth, there exists a lack of proper use of social supervision power. Online influencers' hidden advertisement is spread by social media platforms. In actual practice, the use of the regulatory power of social media users by various countries has not been showed. However, users of social media platforms can also become a force for monitoring online influencers' hidden advertisement because these users are directly exposed to hidden advertisement. Making a better use of social supervision forces can better solve the problem of hidden advertisement that occurs in practice.

Therefore, the author proposes that an effective universal regulatory framework that can solve the above problems should include three general pillars, have a legal foundation, industry self-regulatory supervision, and power from social supervision. The author names this universal regulatory framework, which can regulate online influencers' hidden advertisement, the "Triangle Model".

4.5. Towards a Universal Model of Regulation

The main function of this Part 4.5 is to attempt to build a universal model of regulation, namely "Triangle Model", which may improve or build the regulatory framework of regulating online influencers' hidden advertisement.

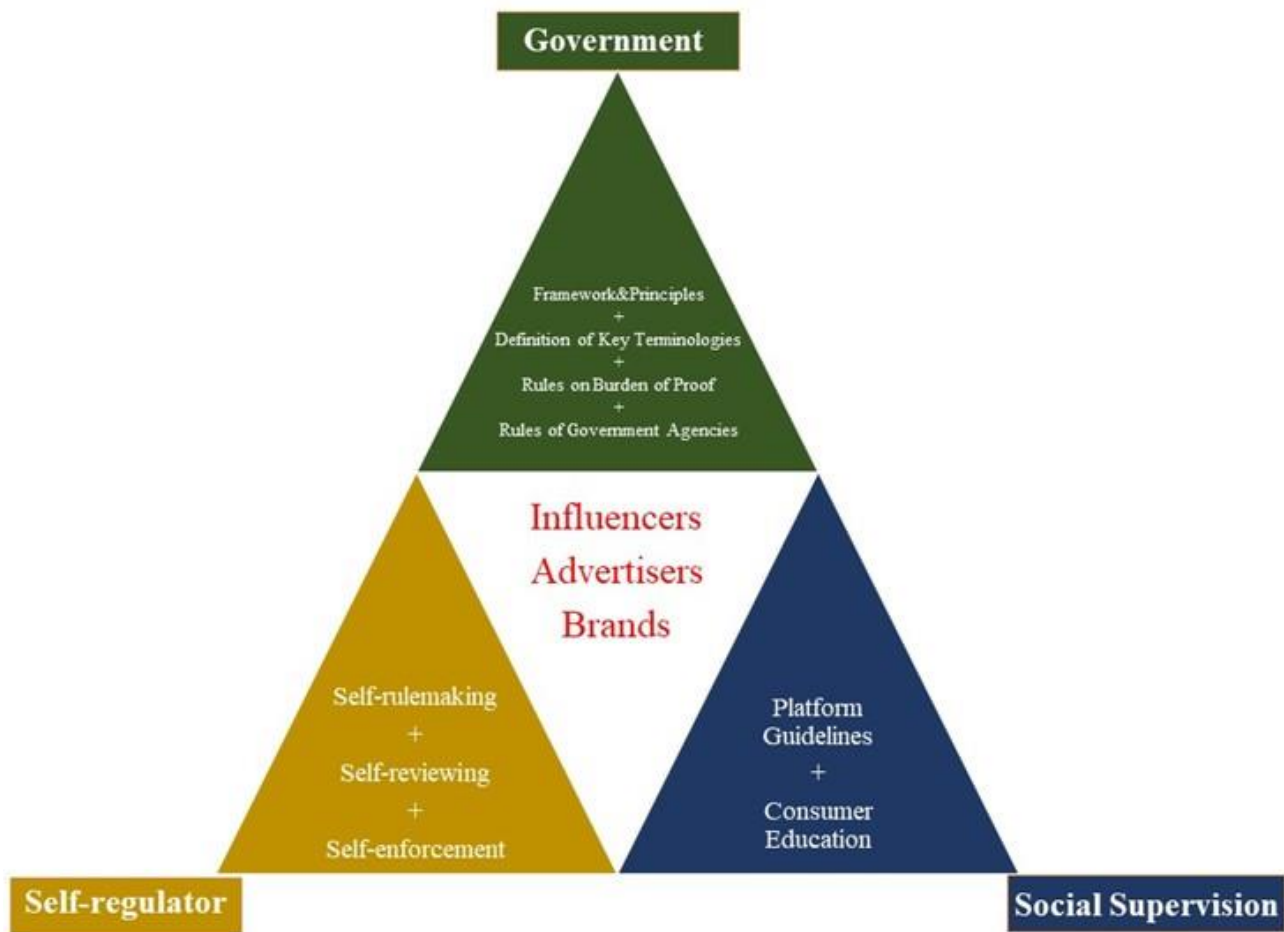
The law does not possess an autonomous existence, legal scholars should steep themselves in other disciplines, such as sociology, or anthropology, or philosophy, or

economics, or literary criticism, or critical theory³⁸⁵. Likewise making a new law requires considerable deliberation. Online influencers' hidden advertisement is not something that can be solved simply by an introduction of a new law. Because the countries and regions discussed in Chapter 3 have different development of law and economics. Similarly, it is not enough to regulate hidden advertisement by simply adding new provisions to existing laws that regulate false and misleading. Because the effective protections need a broader regulatory framework besides the legal foundation. Hence, a model that can universally regulate online influencers' hidden advertisement should be a universal regulatory framework.

Although each country or region already has a certain legal basis for the regulation of advertisement, in order to build a general model for regulating online influencers' hidden advertisement, it is necessary to use the regulatory framework of online advertisement first. Then the regulation of online influencers' hidden advertisement can be further refined by using the regulatory framework of online advertisement.

The universal model proposed by the author called "Triangle Model" can be seen in the following Diagram 1(see next page for details). The three main pillars for the purpose of regulating hidden advertising, which are: Government, Self-regulatory, and Social Supervision. In the Triangle Model, the three main pillars work together to regulate hidden advertising. There are more specific opinions in the three main pillars, which will be introduced one by one in the following discussion. At the center of the Triangle Model are the supervised objects of hidden advertising, namely influencers, advertisers and brands. Other content and explanation in the Triangle Model will also be presented in the following chapters.

³⁸⁵ Ewald, William. 1995. "Comparative Jurisprudence (II): The Logic of Legal Transplants". *The American Journal of Comparative Law* 43 (4): 490. doi:10.2307/840604.

Diagram 1: Triangle Model

4.5.1. Legal Foundation - Domestic Legislation and Government Agencies

In this part, the author will introduce the content of how to establish a legal basis in the Triangle Model. The author will propose four aspects of the content and the direction that the legal foundation should have: (1) Introducing relevant principles into the legal system of consumer protection; (2) Clarifying the relevant definition of hidden advertisement; (3) Determining the burden of proof; (4) Optimizing the functions of administrative agencies. These four aspects are mainly analyzed and studied from the perspective of domestic law and government agencies.

4.5.1.1. Introducing Three Foundational Principles in Consumer Protection Law

Identifying basic principles can guide advertising activities, and basic principles can perform the function of interpreting the legal system and filling legal gaps³⁸⁶. In the same way, setting foundational principles to protect consumers from hidden advertising can fill the gaps caused by the lag of the law. From the previous discussion in Chapters 3 and Part 4.1 and 4.2 of Chapter 4, the author has identified three common principles can be summed up in laws and guideline documents regulating hidden advertising, which are "honesty and truthfulness", "clarity and ease of understanding" and "transparency". Those three principles should be included as the foundational principles of advertising law and consumer protection law related to online influencers' hidden advertisement.

The principle of "honesty and truthfulness" can be found in much existing legal experience. In the Disclosures 101 issued by the U.S. government agency FTC, there

³⁸⁶ Taskovska, Dobrinka. 2010. "General Principles as Sources of Law in The Major Contemporary Legal Systems". *Iustinianus Primus Law Review* 1: 1-14.

are rules guiding influencers to be honest and truthful about their recommendation. At the same time, the FTC directly pointed out that "advertising must be truthful" in the .com Disclosure. In the U.K., the CPRs also require that the market practice be honest. The requirements for "honesty and truthfulness" in these laws or legal interpretation documents show the experience of the U.S. and the U.K. governments in regulating hidden advertisement by applying this principle. The author thinks that from the perspective of regulating online influencers' hidden advertisement the principle of "honesty and truthfulness" means that: influencers and advertisers or brands shall be honest to the audience all the time, and the content of the post that promotes a product or service from influencers or advertisers or brands shall be truthful as well.

The principle of "clarity and ease of understanding" can also find a response in practical experience. In the FTC's Disclosures 101, the FTC requires: "make sure people will see and understand the disclosure" and "use simple and clear language" for disclosure. In addition, the FTC's "the clear and conspicuous requirement" for effective disclosure can also prove that the U.S. government agencies have used the principle of "clarity and ease of understanding" in legal interpretation. In the Guide, the U.K. government agency CMA specifically explains how influencers can make advertising clear. In the CPRs, it is also required that the expression of advertising should be clear and identifiable by the consumer. Thus, in the case of regulating hidden advertising, the principle of "clarity and ease of understanding" is to make sure the disclosure language is easy and understandable to the general public. This is because complex language or techniques will only add to the confusion of, and distrust from, the audience.

The principle of "transparency" can be found in the EU's DSA proposal. The

DSA has indicated that it requires improvement of "transparency" in the field of online advertising. The ASAPCP in ASEAN also stated that ASEAN's mission includes building consumer confidence in a fair and transparent ASEAN markets. Therefore, the author submits that from the perspective of regulating hidden advertising, the principle of "transparency" must make sure the consumer has access and the right to know the commercial connection between influencers and advertisers or brands. Such commercial connections should be transparent all the time. This is because providing more detailed disclosures will lead to higher perceived sponsorship transparency. Using the principle of "transparency" in advertising can increase the credibility of advertisements, which is more conducive to the development of the advertising market and the confidence of consumers.

The audience does not want to be deceived, and appreciates transparency³⁸⁷. The introduction of "honesty and truthfulness", "clarity and ease of understanding" and "transparency" in advertising law or consumer protection law can reduce the chances of consumers facing illegal online advertising. These principles can provide direction and guidance on possible legal issues in the face of unclear laws or legal interpretations. The lag and ambiguity of law exist objectively. Nevertheless, the using principles to interpret existing legal provisions allows legal interpretation to be within the scope of legal purposes, that is, the application and interpretation of legal principles may reduce the question of the legitimacy of the application of the law due to expanded interpretation. Therefore, these principles should be the cornerstone of the law along with specific legal provisions.

It can be seen that the three principles of "honesty and truthfulness", "clarity and

³⁸⁷ Sweetser, Kaye D. 2010. "A Losing Strategy: The Impact of Nondisclosure in Social Media on Relationships". *Journal Of Public Relations Research* 22 (3): 288-312. doi:10.1080/10627261003614401.

ease of understanding" and "transparency" summed up by the author are supported by legal or guideline documents. These three principles can generally show the expectations and bottom lines of various countries and regions for regulating online advertising, and these three principles can be used in the legal system of consumer protection as policy that direct the provisions of regulating hidden advertising.

4.5.1.2. Clarifying the Focus of Hidden Advertisement - Based on "Material Connection"

When introducing the commercial intents and connections between influencers and advertisers or brands in each country or region in Chapter 3, different countries or regions have their own understanding and interpretation. This proves that the regulatory body pays attention to the commercial intention and connection between influencers and advertisers or brands when regulating hidden advertisement. The U.S., the U.K., and Canada call the commercial connection that affects consumers' consumption choices "material connection", the Netherlands calls it a "relevant relationship", and Singapore recognizes it as a "material fact". The definition and categorization of such commercial intent and connections between influencers and advertisers or brands in these legal or guideline documents indicate the importance of "material connection". Relying on the rich experience of those countries that shows the disclosure of the "material connection" between influencers and advertisers or brands will affect consumers' consumption choices to a certain extent.

From the U.S. FTC's definition of material connection, the FTC pays more attention to the attributes between influencers and advertisers or brands including employment relationships, personal relationships, and pure financial relationships

(receiving free products or services, discounts)³⁸⁸.

The payment methods given to influencers by brands more valued in the U.K. include commission; a free loan of a product/service; a free product/service (whether requested or received out of the blue); or any other incentive³⁸⁹. This shows that the U.K. shows that this type of material connection should be disclosed regardless of whether influencers are asking for payment or getting payment without expectation or planning.

The Canadian Competition Bureau's interpretation of material connection also shows that Canada attaches importance to the payment method between influencers and advertisers or brands (received payment in money or commissions; received free products or services; received discounts; received free trips or tickets to events) and a personal or family relationship³⁹⁰. However, Canada's definition of material connection ignores the possible employment relationship between influencers and advertisers or brands, which makes it possible for influencers and advertisers or brands to use this loophole to circumvent the disclosure of material connections.

In the Netherlands, the definition of "relevant relationship" is more concise, and the point is that influencers get "compensation" in money or in kind³⁹¹. The Netherlands ignores possible personal and employment relationships between influencers and advertisers or brands.

Singapore's explanation of the "material fact" that all information that may

³⁸⁸ See the discussion in Part 3.1.2.1. of Chapter 3.

³⁸⁹ See the discussion in Part 3.2.3.3. of Chapter 3.

³⁹⁰ See the discussion in Part 3.4.2. of Chapter 3.

³⁹¹ See the discussion in Part 3.3.2.2. of Chapter 3.

influence consumer choice should be made public is too general³⁹². Although in the previous part, the author has discussed that such commercial connections and intentions between influencers and advertisers or brands can influence consumers' consumption choices, the regulatory subjects cannot expect all the public to know the theory behind it, and regulatory subjects cannot expect influencers and advertisers or brands they already know about their commercial connections and intentions to be a material fact. Influencers and advertisers or brands may argue that they were unaware that their commercial connections and intentions will influence consumers' consumption choices if Singapore regulatory subjects investigate the parties in a hidden advertisement case.

From the different definitions experiences of a material connection or relevant relationship in the above-mentioned countries, in general, the author thinks that the definition and scope of this commercial connection and intent between influencers and advertisers or brands can be called "material connection" should include personal attributes (employment relationships and personal relationships) and pure financial relationship (receiving monetary payments, free products or services, discounts, kickbacks, etc.) between influencers and advertisers or brands. Moreover, the author submits that the "material connection" between influencers and advertisers or brands may include one or more of the followings.

(1) financial relationship: money, free product, free sample, discount, kickbacks;
or

(2) employment relationship: advertisers or brands employ influencers to promote their products, or influencers may be employees of the advertiser or brand from the beginning; or

³⁹² See the discussion in Part 3.5.2.3. of Chapter3.

(3) personal or family connections: influencers and advertisers or brand leaders or employees are friends, or both are family members; or

(4) Other situations where there is an exchange of interests.

Although in The Coldest Water case, the BBB National Programs' National Advertising Division (hereinafter, "the NAD ") did not explain how the Coldest Water exchanged benefits with influencers, from the FTC's definition of material connection, if The Coldest Water paid influencers in the form of kickbacks to circumvent the financial connection, or The Coldest Water promises to give influencers shares of the company and pay dividends at the end of the year to avoid employment relationships to "pay" the influencers. These two behaviors may circumvent the FTC's definition of material connection. Therefore, in the existing experience of the above countries and regions, the author also highlights other possible exchanges of interests to make this provision a catch-all to avoid some influencers and advertisers or brands taking advantage of the fact that the definition of material connection is not comprehensive to avoid legal sanctions. While these exchanges of benefits may not be illegal, failure to disclose these material connections should be.

If there is such a "material connection" between influencers and advertisers or brands, then both parties have the responsibility to act together to disclose this connection as seen in most countries, and cannot solely rely on the other's actions. Commercial speech endorsed by influencers may become false or misleading advertising if influencers and advertisers or brands conceal or mislead consumers about their "material connection". Government agencies could put forward advisory revisions or interpretations for what is not detailed in the law, such as how to make advertisements recognizable clearly in the issue of regulating online influencers'

hidden advertisement. Moreover, government agencies could establish detailed guidelines to guide influencers and advertisers or brands on when, what, and where to disclose. Ensure that the policies and principled provisions in laws or legal interpretations can be understood in the specific implementation measures.

4.5.1.3. Determining Burden of Proof

Regarding the process of investigating online influencers' hidden advertisement, consumers cannot be relied on to provide detailed evidence, because consumers' relatively weak position will have difficulty in obtaining evidence. The burden of proof should belong to influencers and advertisers or brands because they are the substantive subjects that dominate the relevant speech in the post. The burden of proof for influencers and advertisers or brands is able to be achieved.

If the burden of proof of online advertisement is placed on consumers as in China, then based on the uncertainty of online advertisement, it will be difficult for consumers to collect evidence of the material connection between influencers and advertisers or brands. Because the material connection is more of an inner connection between influencers and advertisers or brands, it is difficult for consumers to obtain evidence as a part outside of material connection. Therefore, the burden of proof falls on influencers and advertisers or brands, making the protection of consumers' rights more reasonable. For influencers and advertisers or brands who hold that there is no material connection, there will be more ways to show their original connection or no material connection.

When influencers and advertisers or brands are investigated by regulatory agencies, influencers and advertisers or brands can provide relevant evidence to prove that there is no "material connection". Such evidence includes, but is not limited to,

influencers' provision of invoices for products purchased by themselves; bank transfer records of both parties, etc. This kind of evidence is easier for influencers and advertisers or brands to provide than consumers.

In the regulatory framework constructed by the author, when influencers and advertisers or brands are concealing or refusing to provide evidence related to hidden advertising, or losing, forging, tampering, or illegally destroying relevant evidence, it should be presumed that influencers and advertisers or brands have the fault, the influencers and advertisers or brands shall bear the legal risks of hidden advertising. This means that when influencers and advertisers or brands provide an excuse not to provide relevant evidence to regulatory subjects or falsify relevant evidence, regulatory subjects can presume that there is indeed a material connection between influencers and advertisers or brands.

Influencers should know that as an influential group, their speech or behavior may be discussed or followed by the audience, and the audience places their trust on the influencers they follow. This basis of trust is spread by influencers not for specific individuals but the general public. Then influencers should take some responsibility for the trust they receive. Because of the endorsement of influencers, the products or services of advertisers or brands are known to the audience of influencers, and the endorsement of influencers will affect the potential consumption choices of the audience to a certain extent. Then, advertisers or brands, as the beneficiaries form the endorsement, should bear certain responsibilities to protect consumers as well.

4.5.1.4. Optimizing the Functions of Administrative Agencies

From the perspective of power operation, effective government governance must

rationality position government functions³⁹³. As a symbol of the power of the state, the administrative agencies can show the state's policy and trend of legal regulation. In order to supervise online advertisements in an orderly manner, administrative agencies should form a clear organizational system.

The specific functions of the administrative agencies involving online advertisement should include (1) being responsible for the legislation and legal interpretation of online advertisements; (2) being responsible for the supervision of online advertisements; (3) being responsible for the investigation and handling of related cases of online advertisements; (4) servicing the public and guiding the industry.

Regarding the first point, the FTC in the U.S., the CMA in the U.K., and the Competition Bureau in Canada, as government regulatory agencies, all have issued publications to interpret the details of hidden advertisement in government laws. The FTC issued the Disclosure 101 and the Endorsement Guides to guide influencers on how to disclose material connections. The CMA issued the Guide to lead advertisements of influencers and advertisers or brands to be recognizable. The Competition Bureau has issued a relevant publication to show that the Competition Act applies to hidden advertising. The actions of these government agencies show that they have the function of interpreting the law. Moreover, such interpretation of law bridges the gap between law and practice, making influencers and advertisers or brands more aware of their disclosure responsibilities. Although legislative and executive powers are independent of each other, government regulators may have more frequent and deep understanding and contact with influencer marketing and hidden advertising than legislative bodies. Therefore, government executive agencies

³⁹³ See Footnote 294 above, p.114.

can complete their legislative contributions to online advertising by providing advice to the legislature.

Second, the FTC, the CMA, and the Competition Bureau all supervise influencer marketing to monitor the behavior of hidden advertising. This should be the most basic function of regulatory agencies involved in online advertising. Without the supervision of relevant regulatory agencies, the wrongful acts of influencers and advertisers or brands on social media can be unscrupulous, because there is no authoritative and deterrent supervision from the government agencies. For example, in The Coldest Water case, if there is no supervision from the FTC, even though the NAD warned The Coldest Water that it would be illegal to not disclose the material connection, The Coldest Water did not take the NAD's warning seriously at the beginning and did not cooperate with the NAD's investigation. However, when the NAD warned The Coldest Water to refer it to the FTC, The Coldest Water re-cooperated with the NAD's investigation and corrected its behavior³⁹⁴. This shows that companies like The Coldest Water still have concerns about government agency investigations and place more emphasis on the FTC as a deterrent than warnings from self-regulatory organizations such as the NAD.

Third, government agencies should actively investigate illegal online advertising cases. In response to the CMA's non-acceptance of individual complaints, the above discussion has shown that if government agencies do not accept consumer complaints, the channels for consumers to exercise their rights may be limited to litigation, and the high cost of litigation will discourage consumers from protecting their rights³⁹⁵. Government agencies accepting online advertising cases can expand the channels for

³⁹⁴ See the discussion in Part 3.1.3.2. of Chapter 3.

³⁹⁵ See the discussion in Part 4.2.2.3. of Chapter 4.

consumers to protect their rights, and the process of government agency case investigation can also be a process for government agencies to understand and learn the operation of influencer marketing. However, the government agency's acceptance of the investigation of illegal online advertising cases is not the interference of judicial power. When the government agencies substantiate the relevant influencers, advertisers or brands do have hidden advertising, they can file a prosecution in court. The role of government agencies in the investigation of illegal online advertising cases provides an important preliminary work and assistance to the exercise of judicial power.

Fourth, serving the public and guiding the industry can be the overall policy for management agencies involved in online advertising. As a government agency, the original intention of the regulatory agency is to serve the country and its citizens, and its work in all aspects of the hidden advertisement must not violate the original intention of benefiting the rights of the public. In addition, government agencies, as the macro-control of the economic market, are also very important to guide the direction of the industry. In general, this point can be the guiding policy of the regulatory agency. As a government agency, it should always aim to ensure the interests of the public and guide the sound development of the industry as its task.

The orderly functions of the administrative agencies are inseparable from the optimization of the specific division of work and the utilization of resources. The optimization can be done by mutual cooperation between different administrative agencies. Because of the complexity of online advertising, it may involve not only commercial or economic sectors, but also cultural, educational, food, medical and other aspects. Then this requires each administrative agency to perform its own duties and examine whether online advertisements are legal from their own perspectives. Administrative agencies may consider establishing specialized online advertisement

branches to achieve independent, scientific, and professional supervision of online advertisement so that online advertisements can develop within the regulatory framework.

Specialized online advertisement branches can optimize administrative functions with limited resources. An over-reliance on self-regulatory organizations can lead to difficulties in enforcement. Therefore, administrative agencies should understand that their authority is recognized and trusted by the public, then take the responsibility of protecting consumers.

4.5.1.5. The Limitations of Using Domestic Laws to Regulate Hidden Advertisement

What the author admits is that there are limitations to using domestic laws to regulate online influencers' hidden advertisement. One of the flaws is the lack of general consumer protection, as domestic laws tend to address violations that occur domestically. Based on the transnational nature of social media used by online influencers' hidden advertisement, users may reside in one country, while post publishers may be abroad. Alternatively, every user on social media may be from a foreign jurisdiction. Likewise, the social media platforms accessed by users may also be in foreign jurisdictions.

Every encounter in cyberspace, raises the possibility that diverse laws will apply³⁹⁶. Whilst, private international law may provide legal options for resolving online advertising lawsuits; nevertheless, traditional private international law principles rely on actions linked to a fixed physical location. Connecting factors such

³⁹⁶ Swire, Peter P. 2005. "Elephants And Mice Revisited: Law and Choice of Law on The Internet". University Of Pennsylvania Law Review 153 (6): 1975. doi:10.2307/4150654.

as *lex rei sitae*³⁹⁷ and *lex loci delicti*³⁹⁸ in private international law may become inconsistent with the Internet³⁹⁹.

Given the transnational nature of the Internet, Internet-related disputes may be subject to the jurisdiction of the courts of many countries, so there are limitations to using domestic law to regulate the transnational social media platform. It may also be difficult to regulate online advertising through international law. For instance, the WIPO Copyright Treaty on the Internet took over six years of discussion⁴⁰⁰. Thus, the process of reaching a consensus at the international level may be slow. According to the characteristics of the continuous improvement and updating of Internet technology, such a long-term discussion may not keep up with the rapid development of Internet technology. Moreover, Due to the differences in domestic laws, the same advertising conduct may be illegal in one country but legal in another. However, the conflict between legality and illegality in the dissemination of online advertisements due to different domestic laws could actually be resolved to some degree through non-governmental means. For example, social media platforms that online advertisements rely on can achieve compliance by introducing clear guidelines and rules on content, deleting relevant illegal content or blocking accounts that breach the platform rules. Therefore, in this manner, the conflicts of domestic law may to some extent be alleviated if the government, self-regulators, and social forces attempt to work

³⁹⁷ *Lex rei sitae* is a legal doctrine of international private law. It is Latin for "the law where the property is situated". The law governing the transfer of title to property is dependent upon, and varies with, the *lex rei sitae*.

³⁹⁸ *Lex loci delicti* is the Latin term for "law of the place where the delict [tort] was committed" in the conflict of laws.

³⁹⁹ Thünken, Alexander. 2002. "Multi-State Advertising Over the Internet and The Private International Law of Unfair Competition". *International And Comparative Law Quarterly* 51 (4): 909-910. doi:10.1093/iclq/51.4.909.

⁴⁰⁰ WIPO. "WIPO Copyright Treaty-Contracting Parties". Available at https://wipolex.wipo.int/en/treaties/ShowResults?search_what=C&treaty_id=16. (Accessed 26/8/2022).

together to achieve a balanced dynamic. This should hopefully enable the Triangle Model to work efficiently.

4.5.2. Industry Self-regulatory Supervision

From the experience of the U.S., the U.K., and the EU self-regulatory organizations have played a great role in the regulation of online advertisement, including the supervision, investigation, and reviewing of online advertisement. However, self-regulatory organizations under China's regulatory model do not function well due to a lack of independence. Nevertheless, each country attaches great importance to the role of self-regulation.

For the self-regulatory pillar, the author suggests a sound self-regulatory organization should have three components: (1) rule-making, that is, defining appropriate rules; and (2) reviewing, that is, receiving and investigating consumer complaints (3) enforcement, such as initiating actions against violators⁴⁰¹. Moreover, a successful self-regulatory scheme should include: (1) both the expertise and motivation to perform the self-regulation; (2) reasonable standards of enforcement; (3) fair process and public participation⁴⁰². The claimed advantages of self-regulation over governmental regulation include efficiency, increased flexibility, and reduced cost⁴⁰³. Therefore, as a supplementary force besides government supervision, self-regulatory organizations are important in establishing a regulatory framework for regulating hidden advertisement.

⁴⁰¹ Swire, Peter P. 1997. "Markets, Self-Regulation, And Government Enforcement in The Protection of Personal Information, In Privacy and Self-Regulation in The Information Age by The U.S. Department of Commerce.". SSRN Electronic Journal, 9. doi:10.2139/ssrn.11472.

⁴⁰² Ibid., p.761

⁴⁰³ Campbell, Angela J. 1999. "Self-Regulation and The Media". Federal Communications Law Journal 51 (3): 715.

4.5.2.1. Rule-making

Self-regulatory organizations need to establish the rules that will guide behaviors. Although the author submits that government agencies should mainly undertake the task of legislation and legal interpretation, self-regulatory organizations can also regulate the behavior of members through the formulation of rules. Rule-making in the context of self-regulatory organizations means that self-regulatory organizations formulate rules to regulate members' behavior within their internal supervision system.

Although the authority of the self-regulatory organization to interpret the law is not stronger than that of the legislature, the CAP Code issued by the CAP and the ASA in the U.K. guide the disclosure of material connections by influencers and advertisers or brands and is recognized by the CMA⁴⁰⁴. It shows that the rule-making of self-regulatory organizations is equally important, and government agencies also pay attention to rule-making. These rules are often more detailed and specific than government laws. From another perspective, self-regulation regulations are more stringent than government laws. This can result in strong rule-making for self-regulation, but weak compliance with its rules. However, the rule-making of self-regulatory organizations can reduce implementation costs and improve implementation effectiveness⁴⁰⁵, and more professionally and deeply the industry self-regulatory organization understands members' problems. This means that the rule-making of a self-regulatory organization can be less rigid, which gives members the opportunity to accept the rules more easily. Therefore, the rule-making of self-

⁴⁰⁴ See the discussion in Part 3.2.3.2. of Chapter 3.

⁴⁰⁵ Macenaite, Milda. 2016. "Protecting Children's Privacy Online: A Critical Look to Four European Self-Regulatory Initiatives". *European Journal of Law and Technology* 7 (2): 2.

regulatory organizations is an important part.

In the part about the rule-making of self-regulatory organizations in the Triangle Model proposed by the author, the author also incorporates the principled provisions into self-regulation. A fundamental principle stated in the CAP Code is that: "All marketing communications...should be legal, decent, honest and truthful."⁴⁰⁶ Self-regulatory organizations can also incorporate the main principles of "honesty and truthfulness", "clarity and ease of understanding" and "transparency" into their self-regulation.

In order to make its members aware of what kind of the behavior is expected or required, the self-regulatory organization under the Triangle Model should also publish documents such as guidelines that explain the law or regulation in detail just like the CAP Code and the Guide in the U.K.

Through these specific guidance documents, self-regulatory organizations under the Triangle Model should guide influencers and advertisers or brands on how they can make their disclosures legal. For example, self-regulatory organizations can issue guidance documents to instruct influencers and advertisers or brands on how to use specific language or hashtags such as "#ad", and "#advertisement" to disclose material connections on social media platforms through hashtags.

4.5.2.2. Review Process

Reviewing refers to the function of self-regulatory organizations to investigate related cases based on consumer complaints. Self-regulatory organizations can also provide a channel for the public to handle complaints. Constrained by limited

⁴⁰⁶ See the discussion in Part 3.2.3.2. of Chapter 3.

resources, some government regulators may not accept complaints from individual consumers. Nevertheless, self-regulatory organizations generally do not reject individual complaints. Therefore, the handling of consumer complaints by self-regulatory organizations provides more channels for consumer rights protection.

If the management is effective, the reviewing mechanism of the self-regulatory organization can relieve the task of government agencies or others and solve the problem more directly and effectively. Moreover, the cost of complaints through self-regulatory organizations is often lower than the traditional way of solving problems through litigation.

In a legal analysis, the right of an industry self-regulatory organization to investigate the behavior of its members or the industry comes from the "contract spirit" between the self-regulatory organization and its members or industry. The basis for the self-regulatory organization's investigation of relevant influencers and advertisers or brands is voluntary and not legal binding. Although the investigation of the self-regulatory organization does not have legal force on influencers and advertisers or brands, that is, influencers and advertisers or brands may not cooperate, and they may excuse themselves with no legal obligation to accept the investigation of the self-regulatory organization. However, the meaning behind the reviewing of the self-regulatory organization also means that there are industry regulatory forces have noticed the occurrence of hidden advertising.

Influencers and advertisers or brands may concern about the reviewing of self-regulatory organizations from a practical point of view, considering their own reputation. Investigation of the case may be hindered by the reluctance of influencers and advertisers or brands.

The acceptance of consumer complaints by self-regulatory organizations reflects the vigilance of regulatory forces on hidden advertising, that is, to remind influencers and advertisers or brands that regulatory forces have noticed the occurrence of non-compliant advertising.

The cooperation between the NAD and the FTC in The Coldest Water case also shows that it is possible for advertisers or brands to cooperate with self-regulatory organizations in the investigation of the case. If influencers and advertisers or brands do not cooperate with the investigation, the self-regulatory organization may impose certain penalties on influencers and advertisers or brands in accordance with its self-regulatory regulations, and may even refer to government agencies.

Although the investigation by self-regulatory organizations may not be deterrent enough from a legal level, influencers and advertisers or brands will also be concerned about the reviewing of self-regulatory organizations considering their own reputation, which indirectly reflects the deterrence and importance of the reviewing function of self-regulatory organizations.

Therefore, in the Triangle Model proposed by the author, self-regulatory organizations should have the reviewing function of accepting consumer complaints and investigating cases. Specifically, the author suggests that while the self-regulatory organization accepts consumer complaint cases, it also starts a process of sorting out relevant problems in the advertising industry. For the most intensive part of consumer complaints, self-regulatory organizations can reduce consumer complaints by issuing guidance documents to guide the behavior of the source of complaints— influencers and advertisers or brands. The process by which a self-regulatory organization accepts consumer complaints can also be a way to learn and understand the legal risks of the industry.

4.5.2.3. Enforcement

For self-regulatory organizations, enforcement means taking actions when non-compliance is found. Regulations are only dynamic and deterrent when they are enforced. When the self-regulatory organization investigates and punishes the object of supervision, if the object of supervision still does not cooperate, the self-regulatory organization can refer the relevant case or information to the government agency. This will help to complete the enforcement cooperation between self-regulatory organizations and government agencies.

Self-regulation cannot be fully effective without enforcement power⁴⁰⁷. Government agencies have limited resources and it is impossible for them to investigate and prosecute all violators. The enforcement of self-regulatory organizations can digest some minor non-compliance internally, and refer serious non-compliance cases or cases that have a significant impact on consumers to government regulatory agencies, which also reduces the pressure on government agencies.

Self-regulation needs to be independent, but having a government agency with authority to regulate as a backup can be an important factor in successful self-regulation as well⁴⁰⁸. Therefore, the supervision of the government agency can also help the self-regulatory organization, and the cooperation between the two can also promote the success of the self-regulatory organization.

Therefore, the enforcement function of self-regulatory organizations advocated by the author means that these organizations actively take actions when they find non-

⁴⁰⁷ Stern, Louis L. 1971. "Consumer Protection Via Self-Regulation". *Journal Of Marketing* 35 (3): 50. doi:10.2307/1249789.

⁴⁰⁸ Ibid., p.761.

compliant online advertising, including hidden advertising. The actions may include, but are not limited to, the use of self-regulations to investigate relevant entities, and the imposition of certain punishments, such as fines, to be imposed on relevant parties in accordance with self-regulations.

The NAD's investigation of The Coldest Water shows that the self-regulatory organization's enforcement of hidden advertising includes investigating and urging relevant subjects to correct non-compliant behaviors. Under the guidance and supervision of the NAD, The Coldest Water's removal of hidden advertising also reflects the deterrent effect of the NAD on the enforcement function of advertisers or brands⁴⁰⁹.

From the above discussion of rule-making, reviewing and enforcement of self-regulatory organizations, it can be seen that these three aspects may actually be related in real practice. The reviewing function of a self-regulatory organization may require an implementation of new rules, so that the self-regulatory organization has the right to investigate the relevant parties, so as to enforce the punishment to non-compliant acts. The enforcement of self-regulatory organizations needs to be based on rule-making to making the enforcement has direction and limitation. The author thinks that the rule-making, reviewing and enforcement of self-regulatory organizations are comparable to the separation of powers of the government. Rule-making corresponds to the legislative function, is the code of conduct for members; reviewing corresponds to the administrative function, accepts complaints from consumers and supervises online advertising; enforcement corresponds to the judicial function, punishes illegal online advertising or refers to government agencies. However, these three functions of self-regulatory organizations are more flexible and

⁴⁰⁹ See the discussion in Part 3.1.3.2. of Chapter 3.

controllable than the government's separation of powers. Because these three functions of the self-regulatory organization belong to the internal system, the improvement and change of its functions are often easier to achieve than the change of the state.

In general, there are many conditions for the establishment of a sound self-regulatory organization, this does not mean that the establishment of a self-regulatory organization is meaningless. Although the self-regulatory supervision framework of online advertisement may vary according to the actual situation of different countries and regions, the self-regulation of the online advertising industry should be an important supplement to the government's advertisement supervision. Self-regulation and government regulation are two forces that supervise online advertisement together.

4.5.3. Social Supervision

A large number of online advertisements are posted on social media every day, and the public uses social media frequently. Mere management by government regulators or self-regulatory organizations is not enough. The public will think about the content that appears on social media while browsing. Social supervision pillar is mainly to play the role of self-regulatory organizations and news media from consumer protection activities and public opinion supervision. The purposes of social supervision are to supervise: (1) the business behaviors of advertising companies and the operators; (2) whether the advertising enterprises are operating legally; (3) the violation of consumer rights⁴¹⁰. The author substantiates that social media platform and the audience, i.e., consumers, are two key points that cannot be ignored in order

⁴¹⁰ See Footnote 294 above, p.74.

to make good use of social supervision.

4.5.3.1. Social Media Platforms - Potential Solutions to Transnational Regulation

In Part 4.5.1.5. of Chapter 4 the author has discussed the limitations of using domestic law to regulate hidden advertising by transnational social media platforms. However, if government agencies decentralize the power of supervision to the social media platform, that is, using social media platforms to supervise online advertising might solve the problems faced by government agencies in transnational supervision.

Globalization though does not render national governments powerless, nevertheless throws up challenges of coordination and regulation that national governments cannot effectively address⁴¹¹. Social media companies should not hide behind the claim of being merely a 'platform' and maintain that they have no responsibility themselves in regulating the content of their sites⁴¹². Social media platforms can be the gatekeepers for audience viewing of content. Social media platforms can decide what users can share, and with whom users can share, and social media platforms may even suspend or terminate accounts as well. Social media platforms can help influencers and advertisers or brands reduce legal risks and help consumers exercise their rights. In so doing, social media platforms can use their technology to avoid lawsuits and reduce the cost of consumer complaints, such as the reporting function of social media platforms.

When the audience on TikTok wants to report the content on TikTok, they only

⁴¹¹ Scott, Colin, Fabrizio Cafaggi, and Linda Senden. 2011. "The Conceptual and Constitutional Challenge of Transnational Private Regulation". *Journal Of Law And Society* 38 (1): 2. doi:10.1111/j.1467-6478.2011.00532.x.

⁴¹² House of Commons. "Disinformation And 'Fake News': Final Report". 8th ed. Available at <https://publications.parliament.uk/pa/cm201719/cmselect/cmcomeds/1791/1791.pdf>. (Accessed 26/8/2022).

need to tap the "Share" button, select "Report", and follow the instructions provided⁴¹³. The report is not limited to time and place. For the regulation of online influencers' hidden advertisement, social media may play a greater role. Because laws and regulations require the advertisement to be identifiable, which means influencers need to disclose the material connection in the post. The common way of disclosure is to use the hashtag function of social media platforms. Social media platforms will make supervision easier by managing tags, because there is no need to review the content of the post, but directly check whether the influencers have "#ad", "#advertisement" and so on.

Content on social media is widely disseminated and received by massive users. Although there may be many problems with an online advertisement, making better use of the supervision power of the audience can make the supervision framework of online advertisement more complete. The platform has the potential legal responsibility to undertake the supervision function of online advertisement as well. Due to the multinational nature of social media companies, this regulatory force should not be underestimated.

4.5.3.2. Consumer Education

The public arguably lacks awareness of online influencers' hidden advertisement and hence may think that hidden advertisement cannot be regulated⁴¹⁴. This situation may come from society's lack of work on educating consumers. The false and misleading nature of online influencers' hidden advertisement is as same as the core of

⁴¹³ TikTok. "Report A Problem". Available at <https://support.tiktok.com/en/safety-hc/report-a-problem>. (Accessed 13/8/2022).

⁴¹⁴ González-Vaqué, Luis. 2020. "Do Food Influencer Activities Require Specific Regulation?". *European Food And Feed Law* 15: 124.

the general false and misleading advertisement. Online influencers' hidden advertisement can be regarded as a branch of false or misleading advertisement.

The public's lack of understanding of online influencers' hidden advertisement is because the education of the relevant knowledge of online influencers' hidden advertisement is not popularized in society. Because part of the public will think that "influencers" is a less serious profession, like a passing trend, and do not dare to predict what will happen in the next decade⁴¹⁵. Nevertheless, this is a wrong view because the existing influencer marketing is already a promising market. The public's exposure to influencer marketing is also quite broad⁴¹⁶.

Therefore, it is not enough to educate influencers and advertisers or brands only. Consumers, as the audience of influencer marketing, should also know how influencers benefit from promoting products on social media, as well as the consequences that consumers may suffer from the online risk. Educating consumers about the scope of their rights enables consumers to exercise their rights better. The influence of influencers comes from their follower groups, but the follower groups and audience play a role as supervision as well when they watch the influencers' posts.

When consumers have the ability to judge whether an online advertisement is a hidden advertisement, consumers then have the opportunity to file complaints against influencers and advertisers or brands that do not clearly disclose the "material connection". Therefore, considering the regulatory framework, the public should also have more opportunities to receive consumer education. These opportunities can come from publicity by government agencies, lectures about the online advertisement from

⁴¹⁵ Ibid.

⁴¹⁶ Ibid.

society, etc.

Consumer education is the preparation of an individual to be capable of making informed decisions when it comes to purchasing products⁴¹⁷. The government or industry self-regulatory organizations or other social forces could ensure that consumers can receive an education so that consumers have knowledge about consumption and consumer rights protection to exercise their rights better. When consumers have knowledge related to the hidden advertisement, then consumers can identify the illegal behavior and the harm to their rights. When consumers complain or report hidden advertising or other illegal online advertising through the knowledge they have learned, this behavior feeds back practical information to the regulatory framework of online advertisement, which can help promote the regulatory framework to understand its deficiencies and defects, and then the regulatory framework can be positively fed back into improvement.

Overall, in addition to considering the supervision power from social media platforms and consumer education, the transaction costs from those social supervision aspects also need to be taken into account because extra regulation and supervision need fiscal support from the state. Questions may have to be addressed about how these costs are best allocated, the answer to which may vary from country to country.⁴¹⁸

4.5.4. Expected Results from "Triangle Model"

When state governments govern transnational issues, there will be various

⁴¹⁷ Code Of Federal Regulations: 1949-1984. 1966. U.S. General Services Administration, 636.

⁴¹⁸ For further discussion on the issue of cost allocation for the purpose of online content regulation, see, for example, "*Regulating Online Content Moderation*" by Kyle Langvardt, and "*Creating Parallels in the Regulation of Content: Moving from Offline to Online*" by Lyria Bennett Moses.

problems, such as the uncertainty of jurisdiction. However, at present, the non-state departments are playing an increasingly important role in the issue of transnational governance. The EU institutions, for example, have made increasing reference to regimes that link public encouragement to private capacity, under the rubric of co-regulation, as a means to regulate more effectively with less use of public resources⁴¹⁹. In fact, on the issue of regulating online influencers' hidden advertisement, based on the transnational nature of social media platforms, regulating online influencers' hidden advertising also has the color of transnational governance. In practice, the U.S., the U.K., the EU, and Canada rely on self-regulatory organizations to regulate online advertising, which also shows the cooperation between the government and non-state departments. This proves that the regulation of online advertisement requires efforts from many aspects.

Therefore, in the Triangle Model proposed by the author⁴²⁰, the author regards "Government", "Self-regulator", and "Social Supervision" as the supervisory subjects under the regulatory framework for regulating hidden advertising, and the three pillars work together to supervise online influencers' hidden advertisement, located at the three vertices of the triangle. Influencers, advertisers, and brands, as the regulatory objects in the center of the entire Triangle Model, are monitored and regulated by these three regulatory subjects. Contents within the three small triangles representing regulatory subjects are the regulatory and guidance topics that the author substantiate under the Triangle Model in Parts 4.5.1., 4.5.2., and 4.5.3 of this chapter.

The "Triangle Model" proposed by the author is not without literature support. In the "Governance Triangle" theory proposed by Kenneth W. Abbott and Duncan

⁴¹⁹ See Footnote 410 above, p.8.

⁴²⁰ See Diagram 1 in Part 4.5. of Chapter 4.

Snidal, the two scholars regard "states, firms, and NGOs⁴²¹" in the "Triangle" as the three elements in global production⁴²². The use of the "Governance Triangle" can also be seen in environmental and labor rights regimes⁴²³. Moreover, such collaborative governance is considered effective⁴²⁴. Therefore, referring to the "Governance Triangle" proposed by Kenneth W. Abbott and Duncan Snidal, the author submits that, based on the "Governance Triangle", there can be a new "Triangle Model" for regulating online advertisement.

The "Triangle Model" that the author expects to solve online influencers' hidden advertising does not rely on a single force. Instead, it is based on some form of cooperative governance between the three main pillars - the government and the industry self-regulation and social forces. This kind of cooperative governance can be reflected as follows:

(1) A mixture of public power's legal instruments and private power's regulatory instruments, that is, there are legal legislations and interpretations as well as industry self-regulations;

(2) Law enforcement cooperation between government and non-government actors, that is, self-regulatory organizations accept and review complaints and reports from consumers, and the filtered complaint cases and the important cases can be referred to government agencies;

⁴²¹ A non-governmental organization (NGO) is an organization that generally is formed independently from the government.

⁴²² Abbott, Kenneth W., and Duncan Snidal. "The Governance Triangle: Regulatory Standards Institutions and The Shadow of The State". In *The Politics of Global Regulation* (Princeton University Press, 2009), 49-57.

⁴²³ See Footnote 410 above, p.12.

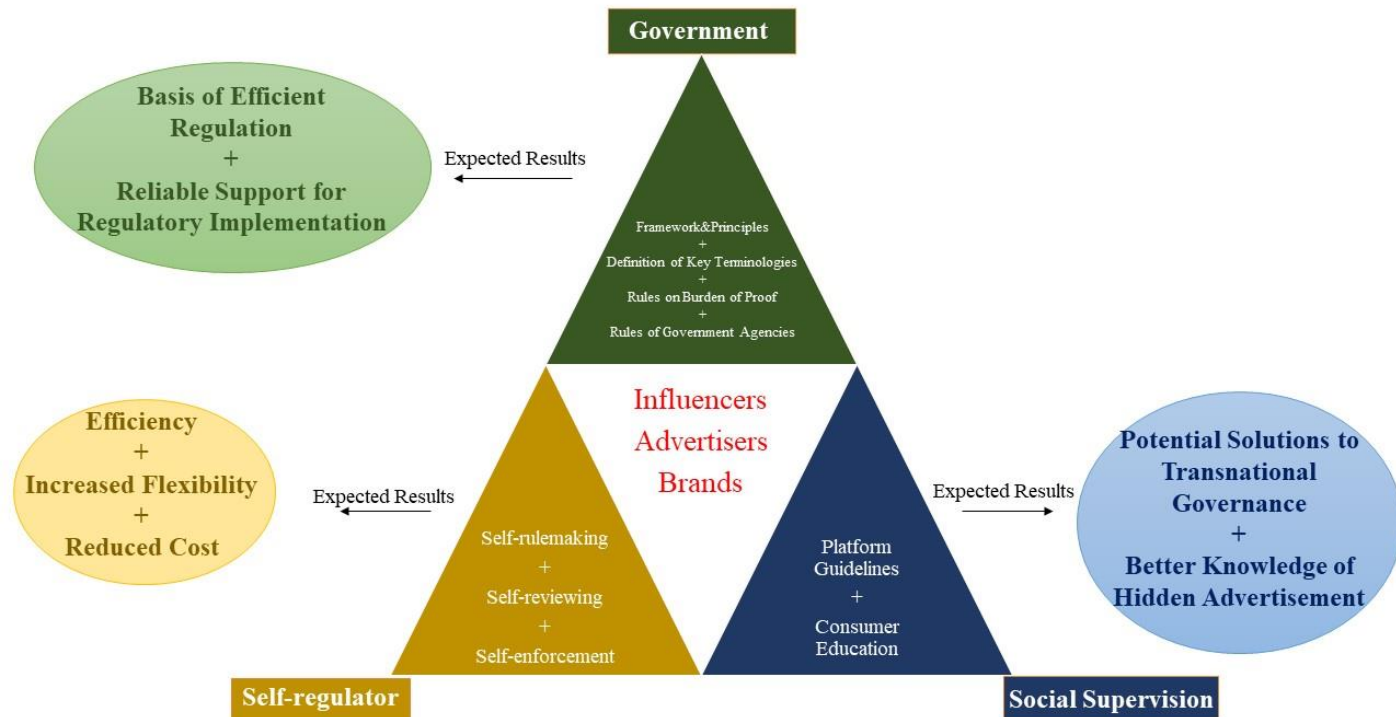
⁴²⁴ See Footnote 410 above, p.19.

(3) Social forces diffused into the government and industry self-regulation, that is, social supervision can be enforced by the government through litigation, or can be digested by industry self-regulation.

The expected result of the government recommendation is that it can provide a basis for more effective supervision and regulation. Then, the improved legal basis can provide reliable support for subsequent implementation. The expectation behind the self-regulators is that a good self-regulatory organization structure and regulations can achieve effective, flexible, and low-cost solution. The role of the social perspective is to provide a possible direction for the potential transnational governance of social media and hidden advertising. Moreover, popularize the knowledge about hidden advertising to let more consumers know about illegal online advertising methods, in the hope that they can actively use their rights to tackle the non-compliance or illegal practice. Therefore, the expected results of Triangle Model can be seen in the following Diagram 2 (see next page for details).



Diagram 2: Expected Results of Triangle Model



Although the author emphasizes that government, industry self-regulation and social supervision should work together, the state government should still play a leading role. Whether domestically or internationally, the government's position as a regulator is not outdated. Instead, its role is evolving from the centralized mandatory regulator of tradition to a more subtle role as catalyst, coordinator, and supporter of diverse regulatory activities⁴²⁵. Thus, in the "Triangle Model", the domestic government is still at the top.

What the "Triangle Model" wants to express is to use the power of government agencies and non-government agencies, that is, industry self-discipline and social supervision, to complete the construction of a complex regulatory framework for online advertisement. Compared with single government regulation or industry self-regulation, the "Triangle Model" can combine their strengths, effectiveness, and efficiency. The "Triangle Model" has both the legal basis of government agencies and the collaborative help of industry self-regulation and social supervision. Under the complex transnational background of online influencers' hidden advertisement, the "Triangle Model" could also play its role to reduce the appearance of illegal online advertising.

To sum up, this chapter discusses the various problems that countries and regions have exposed in using existing domestic laws and existing self-regulation to regulate hidden advertising. These problems pose real difficulties and challenges that one has to face in practice. Exposing and analyzing these problems and challenges will be helpful to clarify the limitations of the existing regulatory framework for regulating hidden advertising. It is also helpful to put forward constructive suggestions and recommendations to establish a universal model for regulating online influencers'

⁴²⁵ See Footnote 422 above, p.88.

hidden advertisement. The universal “Triangle Model” proposed by the author hopes to establish an appropriate regulatory framework from three major pillars. The analysis and specific suggestions on the government, self-regulatory organization, and social supervision in the Triangle Model can provide effective outcomes for regulating online influencers' hidden advertising.



Chapter.5 Conclusion and Recommendation

5.1. Conclusion

The study undertaken in this thesis explores the legal issues relating to hidden advertisement by online influences. The development of the Internet has brought a new profession into the public eyes - "influencers". An "influencer" relies on different functions of social media: they may be a blogger, a vlogger, a Youtuber, and so on. Despite the differences in the form of identities and roles, the fact remains many of them have garnered enormous influence amongst their audience, or "followers". The audience follows the influencers on the social media platforms, and the influencers' speech and behaviors attract the attention of the audience. At this time, some influencers arguably abuse their influence and the audience's trust by endorsing commercial promotions, openly or surreptitiously, to capitalize on their influence. Advertisers or brands use influencers to endorse their products or services by paying them or giving them free products. Such a commercial connection can be called a "material connection".

Such business model in itself perhaps should not be condemned; however, the problem is that when influencers promote products or services, they may not necessarily disclose their commercial connections with the advertisers or brands to the audience. This is called "hidden advertisement". The material connection between influencers and advertisers or brands should not be ignored. Existing research shows the disclosure of "material connection" affects the audience's consumption choices. Influencers use their own influence to make the promoted products or services known

to more audiences. Arguably, the main purpose of such behaviors of influencers and advertisers or brands in hiding "material connection" from the audience is to deliberately mislead them into buying related products or services. Influencers who choose not to disclose "material connection" may consider that if they disclose such "material connection", their credibility of evaluation will be reduced. This is not conducive to the objective of enticing consumers to buy related products or services. Thus, many influencers chose to hide the fact that the content is paid advertisement. By convincing the audience that the promoted product or service is endorsed by personal recommendation, the audience could have a positive purchasing intent toward the product or service.

Chapter 2 first demonstrates the relevant conceptions of online influencers' hidden advertisement and the background of influencer marketing, as well as the necessity of regulating online influencers' hidden advertisement. From the perspective of false and misleading advertisement in a broad sense, the online influencers' hidden advertisement can satisfy the characteristics of false and misleading advertisement. The introduction of the Unique Selling Proposition Theory and the Herding Theory in Chapter 2 both show that the endorsement of products or services by influencers is an important factor affecting consumer choices. Influencers, advertisers or brands may at times conceal their commercial connections from their audience. Moreover, such commercial connections are often material. Thus, it may be seen from the discussion in Chapter 2 that online influencers' hidden advertisement does exist in various social media platforms, and the disclosure of commercial intent between influencers and advertisers or brands is a matter of consumer protection.

Chapter 3 introduces the laws and regulations of the U.S., the U.K., the EU, Canada, ASEAN, and China on online influencers' hidden advertisement. The

discussion in Chapter 3 includes an introduction to various regulatory agencies and an analysis of specific legal or guidance documents. It shows that, as an important factor in online influencers' hidden advertisement, the concept of "material connection" is the focus of many countries. The Federal Trade Commission (hereinafter, "the FTC") in the U.S. provides the definition of the concept of material connection with regards on hidden advertisement as "a personal, family, or employment relationship or a financial relationship – such as the brand paying influencers or giving influencers free or discounted products or services". In the U.K., the Competition and Markets Authority (hereinafter, "the CMA") along with the Committee of Advertising Practice (hereinafter, "the CAP") published Influencers' Guide to Making Clear That Ads Are Ads (hereinafter, "the Guide"), which defines material connection as being more specific, and argues that other reciprocal arrangements should also be counted as "payment" in "material connection". The "relevant relationship" in the Netherlands, the Advertising Code for Social Media & Influencer Marketing 2019 (hereinafter, "the RSM") has a similar regulatory trend.

From the broad sense of false and misleading advertisement, online influencers' hidden advertisement can satisfy the characteristics of being false and misleading. Therefore, the legal provisions for false and misleading advertisements and the requirement of recognizability can regulate online influencers' hidden advertisement to a certain extent. Nevertheless, this view ignores the scope of the applicability of the provisions for false and misleading advertising, namely whether online advertising is included in the scope of advertising in each domestic law. In the U.S., the FTC has indicated in its administrative interpretation that the Federal Trade Commission Act (hereinafter, "the FTCA") can be applied to online advertisements. In the U.K., the actual practice of the CMA also shows its tendency to regulate online advertisement. In China, the law was amended to include online advertising under the content of the

Advertisements Law of the People's Republic of China (hereinafter, "the CAL"). The practices in all these countries illustrate the current trend that the legal scope of advertising should include online advertising. However, the laws of some countries are still unclear on the matter. For example, Vietnam's Consumer Protection Law 2010 only stipulates that "hiding or providing incomplete, false or inaccurate information" is prohibited. Moreover, it has been argued in a study that online advertising is not covered by the advertising regulation in Thailand. Therefore, the discussion in Chapter 3 shows that each country or region has different developments of regulations on online influencers' hidden advertisement, and these differences are reflected in the limitations of the online advertisement regulatory framework.

Chapter 4 discusses the issues regarding the regulatory framework of online advertisement in various countries examined in Chapter 3, and mainly focuses on the specific issues of the regulatory framework of online advertisement at the domestic level and the industry self-regulation. For example, even if the regulations governing hidden advertisement can be found in the laws and self-regulatory documents of the U.S., the U.K., and some EU countries, many problems still ensue due to insufficient laws and difficulties in the interpretation of the law. For example, there are issues relating to the inconsistency between the object of supervision and the object of practical punishment in regulations or self-regulation; the limited function of the government agencies; the difficulties of consumers bearing the burden of proof, etc.

The U.K. mainly relies on self-regulatory organizations to handle the hidden advertising, because there is no direct provision prohibiting hidden advertisement in laws or legal interpretation documents. Nevertheless, based on the self-regulatory regulations issued by the Advertising Standards Authority (hereinafter, "the ASA") and the CAP, the public can clearly understand the prohibition of hidden

advertisement by self-regulatory organizations. Similarly, the prohibition of hidden advertisement in the field of online advertisement can also be found in the self-regulatory organization documents of Italy and the Netherlands. However, in other countries such as China and ASEAN countries, it is difficult to find laws or self-regulatory documents that can directly regulate hidden advertisement.

The discussion in Chapter 4 demonstrates that although various countries or regions may already have potentially applicable laws or self-regulation for hidden advertisement, the root of various problems caused by online influencers' hidden advertisement is the insufficient regulatory frameworks directly dedicated to online advertisement. To consider an example of virtual currency, although the regulatory framework for regulating currency is not perfect, it does not affect the regulation of virtual currency. In the same way, although the existing regulatory framework for online advertisement is not perfect, it does not mean that regulation of online influencers' hidden advertisement is not vital. Hidden advertisement itself is a branch of online advertisement. Therefore, a universal regulatory framework to avoid online influencers' hidden advertisement should be established under a sound online advertising regulatory framework.

5.2. Recommendations

The author proposes a universal regulatory framework, entitled the "Triangle Model". As discussed in full in Chapter 4, the Model aims to regulate online advertisement and hidden advertisement through three pillars of cooperative governance: sufficient legal basis, sound self-regulatory organizations, and social supervision. In order to meet the needs of the development of the network economy market, it is necessary to solve the practical problems of online influencers' hidden advertisement, then it will be possible to improve the traditional advertising

supervision towards a more transnational online advertisement governance. An online advertisement regulatory framework that can regulate online influencers' hidden advertisement should adhere to the cooperation between legislation and administration. Government regulation, industry self-regulation, and social supervision should cooperate, so as to realize an effective online advertisement regulatory framework with multi-party efforts and supervision.

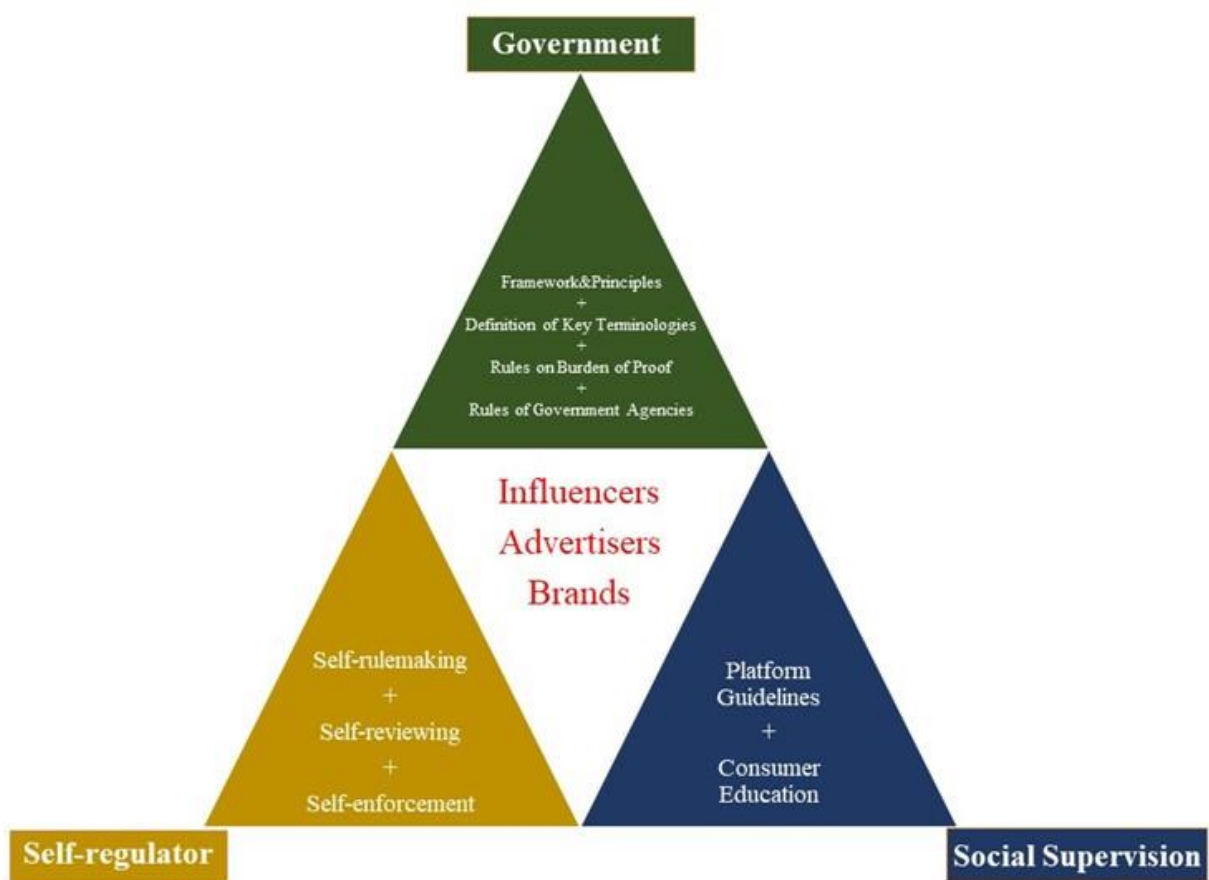


Diagram 1: Triangle Model

Relying solely on social supervision or industry self-regulatory supervision, the supervision of online advertising will inevitably fail due to lack of authoritative backing from the state and its agencies. The regulatory framework for online advertisement is a complicated matter. While strengthening government supervision

functions, social supervision by the society and industry self-regulatory organizations can reduce the costs of government supervision. The universal regulatory framework for online advertisements that can regulate online influencers' hidden advertisement is inseparable from government regulation, industry self-regulation, and social supervision. Only when multiple parties work together can the environment for regulating online advertisements be expected to develop smoothly and healthily.

For the establishment of the universal model - the "Triangle Model" - that aims to effectively regulate online influencers' hidden advertisement, the author puts forward three general recommendations.

Recommendation 1: Improving legislation and legal interpretation and optimizing the functions of administrative agencies.

A universal online advertising regulatory framework should have sufficient legal basis and legal interpretation guidance, in order to clarify any existing vague definitions and rules in their enforcement and scope. For example, there may be a need to clarify the definition and scope of the material connection between influencers and advertisers or brands; based on the convenience of evidence collection, influencers and advertisers or brands should be made to bear the burden of proof; the administrative agency should make better use of its resources to better handle consumer protection and case investigations.

Recommendation 2: Building sound self-regulatory organization.

A universal online advertising regulatory framework should use self-regulatory organizations to produce more detailed explanations and guidelines for further enforcement of the law. For example, self-regulatory organizations should undertake

to fill in the gaps that are not specified in the law; the self-regulatory organization should handle other matters that the administrative agencies cannot handle due to the limited resources.

Recommendation 3: Using the power of social supervision.

A universal online advertising regulatory framework should also use social supervision to make the administration and the operation of self-regulatory organizations and administrative agencies more complete and more efficient. For example, consumer education should be enhanced to raise the aware of the diversity and potential risks of online advertisement, and to enable consumers to have sufficient knowledge to understand the scope and exercise of their rights; consumers' supervision and complaints should be employed as a mechanism to solve real problems in online advertisements; the complaint function and guideline of social media platforms should allow consumers to have more channels for exercising their rights, and to lead the influencers and advertisers or brands in social media to improve the level of their compliance.

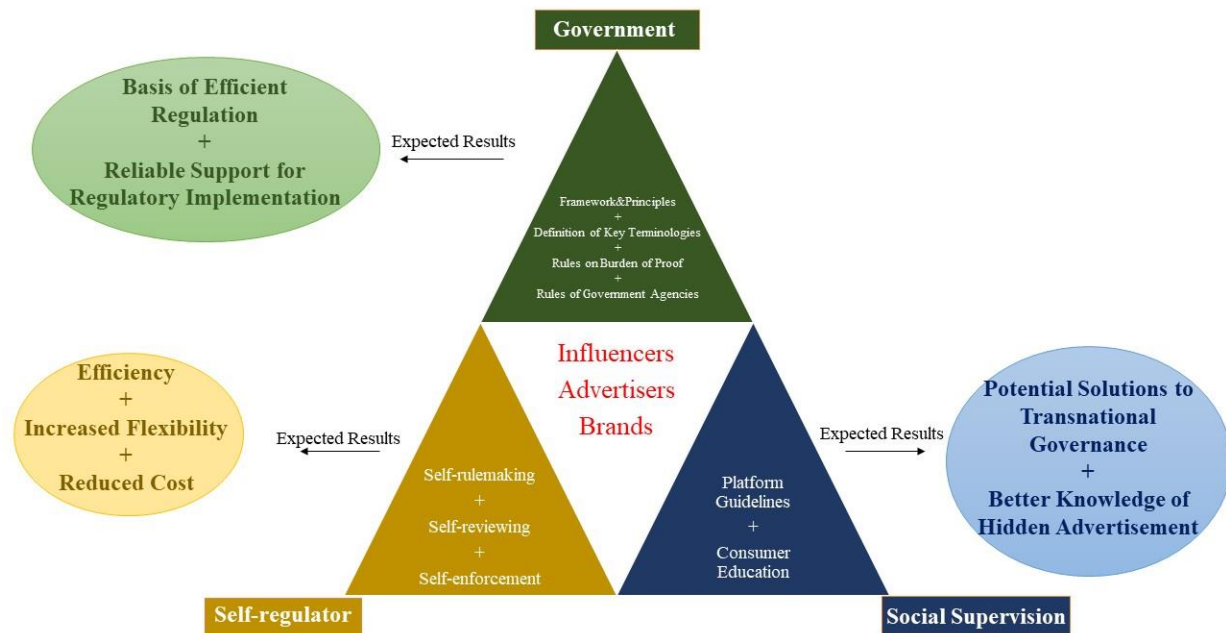


Diagram 2: Expected Results of Triangle Model

In general, the establishment of a universal regulatory framework for online advertisement can provide a direction and scope for regulating online influencers' hidden advertisement, so that the problems caused by insufficient regulation could be reduced. Due to the diversity of languages and the degrees of material collection, the research scope and depth may be limited to some extent. Issues related to transnational governance challenges, human rights protection, transaction costs, and other challenges or limitations may affect the effectiveness and efficacy of the Triangle Model. However, these issues also merit further research as these areas of law are beyond the scope of this study. Generally, the introduction of influencer marketing and the discussion of online influencers' hidden advertisement in this thesis can help more audiences to understand the flaws in the existing regulatory framework of online advertisement. With the continuous development of Internet technology and legal improvement, research related to online influencers' hidden advertisement could significantly contribute to a betterment of online environment.

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APPENDIX

Appendix 1

A Native Advertisement Provided by Google

The screenshot shows a web browser displaying a page from azcentral.com. The page title is "Offline Advertising Ideas". The main content area features an article about promotions, with a native advertisement for "บริษัท เจทีเค แอคเคาน์ติ้ง จำกัด" (JTK Accounting Co., Ltd.) integrated into the text. The ad includes a map, contact information (phone number 8,860฿, email info@jpkaccounting.com), and buttons for "Directions" and "Website". The ad is labeled "Ads by Google".

URL: <https://yourbusiness.azcentral.com/offline-advertising-ideas-12859.html>

Page Title: azcentral LOCAL SPORTS THINGS TO DO BUSINESS TRAVEL POLITICS OPINIONS HOMES SUBSCRIBE ARCHIVES NATION JOBS MORE

Article Title: Offline Advertising Ideas

Article Content:

Promotions

Some people differentiate promotions from advertising, while others consider some forms of promotions as advertising. Traditional advertising promotions include free logged items such as pens, caps and coffee cups. Advertising promotions can also include direct mail, coupons, fliers and tabletop displays.

บริษัท เจทีเค แอคเคาน์ติ้ง จำกัด

จดทะเบียนบริษัท

จดทะเบียนบริษัท 8,860฿ เท่านั้น (รับเอกสารฟรี, บริการภาษี) อีเมลล์ : info@jpkaccounting.com

Directions Website

REFERENCES WRITER BIO IMAGE CREDIT

More Articles

- The Average Advertising Costs for Small Businesses
- How to Make Money Selling in

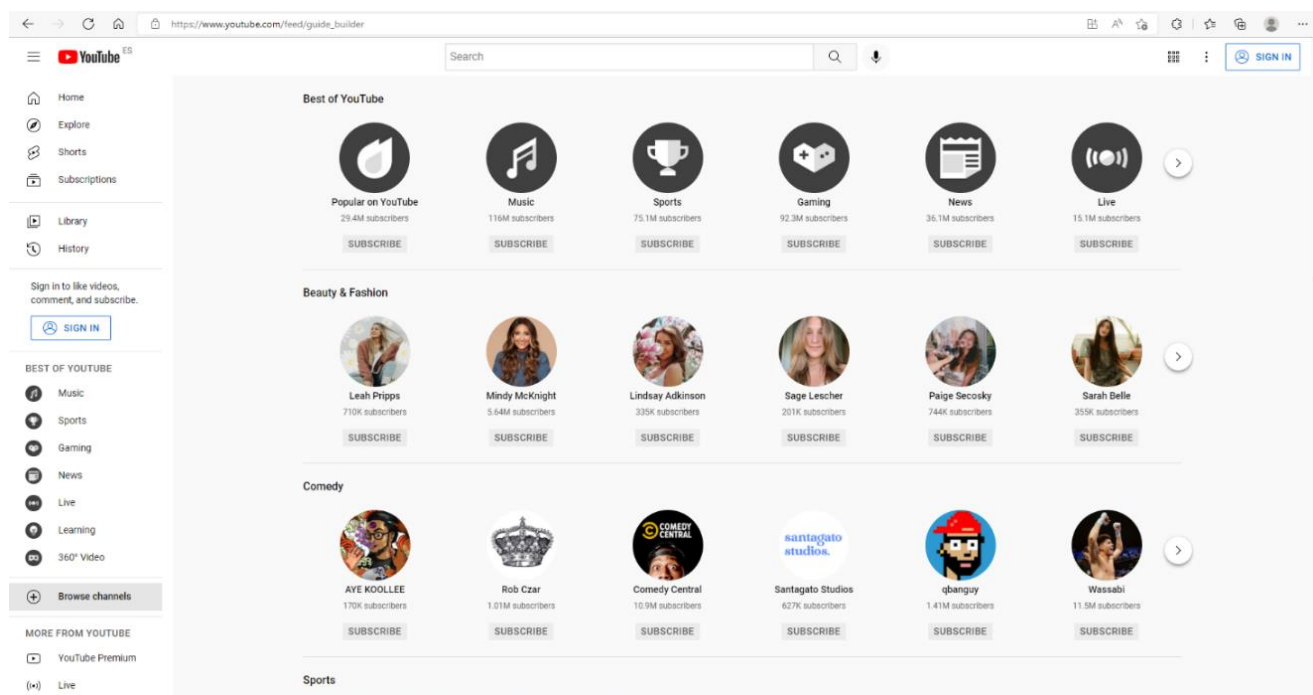
Footer:

ปิดด้วยที่สุดแห่งพลังสร้างสรรค์

ไม่ยุ่งเรื่องใคร... เริ่มต้นด้วย AI ใหม่ใน Creative Cloud

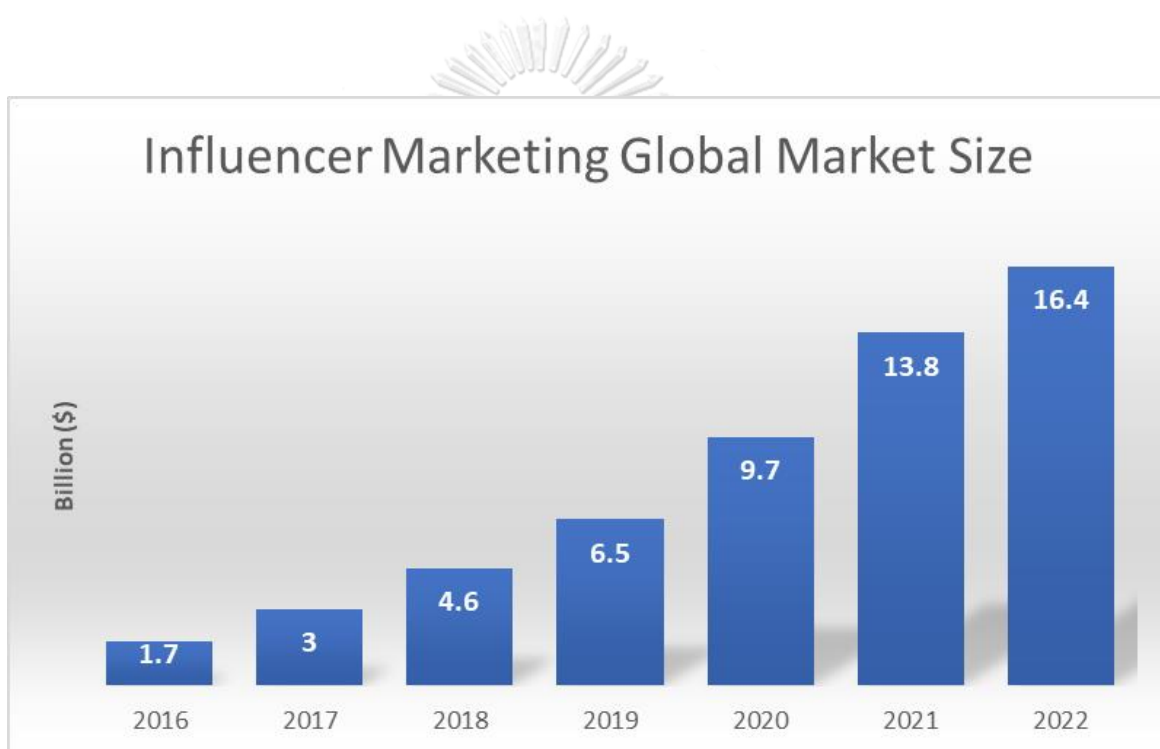
Appendix 2

The Homepage of YouTube



Appendix 3

Influencer Marketing Global Market Size



Appendix 4

The "For You" Page of TikTok



Appendix 5

The Chinese Vision of TikTok



Appendix 6

Li Ziqi Posted a Video of Her Making Tea on YouTube



CHULALONGKORN UNIVERSITY

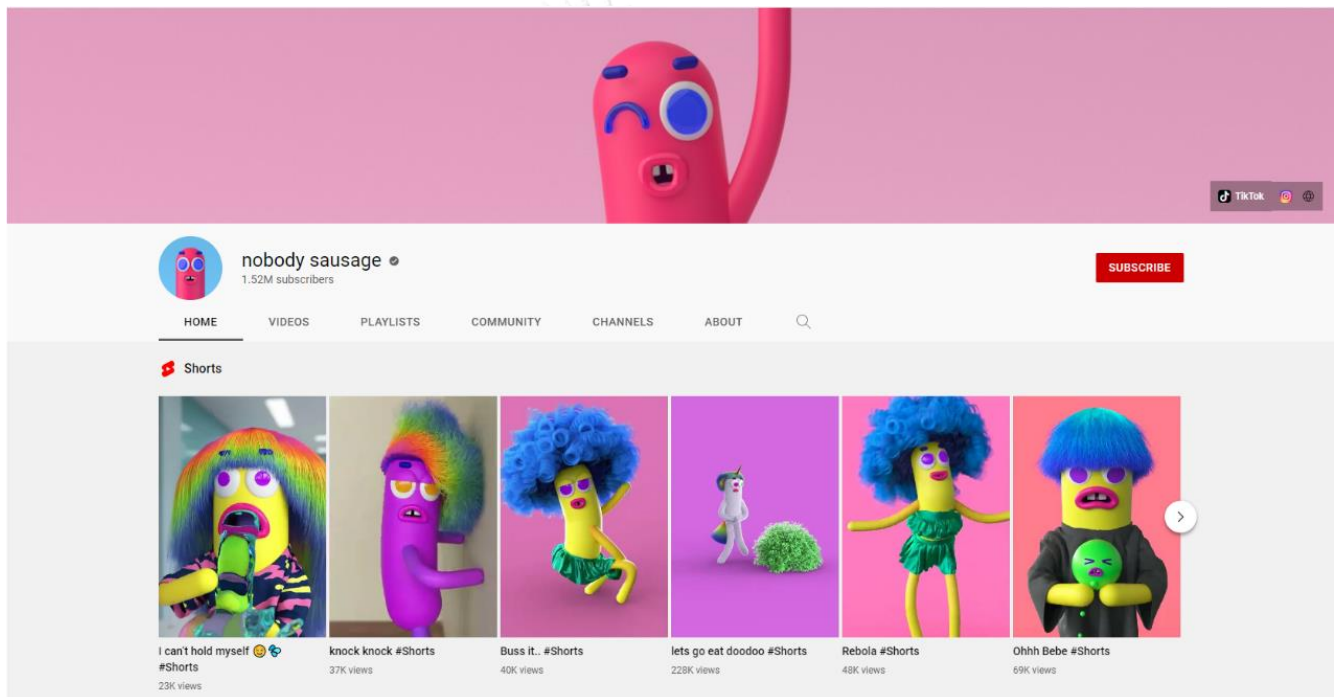
Appendix 7

Li Ziqi's Homepage on the Chinese Version of TikTok(抖音)



Appendix 9

Nobody Sausage on YouTube



The screenshot shows the YouTube channel page for 'nobody sausage'. At the top is a banner image of a pink, sausage-like character with a blue eye and a red arm. Below the banner is the channel name 'nobody sausage' with a verified badge and '1.52M subscribers'. A red 'SUBSCRIBE' button is on the right. The navigation menu includes 'HOME', 'VIDEOS', 'PLAYLISTS', 'COMMUNITY', 'CHANNELS', and 'ABOUT'. The 'Shorts' section is active, displaying a grid of six video thumbnails. Each thumbnail shows a colorful character in various poses and outfits. Below each thumbnail is the video title, the number of views, and the hashtag #Shorts.

| Video Title | Views | Hashtag |
|----------------------------|------------|---------|
| I can't hold myself 🤪🤪 | 23K views | #Shorts |
| knock knock #Shorts | 37K views | #Shorts |
| Buss it.. #Shorts | 40K views | #Shorts |
| lets go eat doodoo #Shorts | 228K views | #Shorts |
| Rebola #Shorts | 48K views | #Shorts |
| Ohhh Bebe #Shorts | 69K views | #Shorts |

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