

Content Monetization

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introduction

Social networks facilitated an unprecedented scale of borderless sharing. As peer-to-peer platforms, they have been democratizing and decentralizing digital services around content creation,¹ initially referred to as user-generated content.² In their evolution, social media platforms gradually introduced new opportunities for users to monetize this content, primarily as a means to generate revenue outside of their advertising business.³ Nowadays, it is possible for any person around the world to make a social media channel or account (e.g., on YouTube, Instagram, or TikTok) and make content for a living,⁴ as a part of a newly minted and increasingly popular content creator economy.⁵

Social media has been a constant focus for scholarship spanning a vast array of disciplines. Particularly in legal writings, freedom of expression

¹ See, e.g., danah m. boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. COMPUT.-MEDIATED COMM'N 210 (2007); JOSÉ VAN DIJCK, *THE CULTURE OF CONNECTIVITY: A CRITICAL HISTORY OF SOCIAL MEDIA* (2013).

² Jennifer M. Proffitt, Hamid R. Ekbia & Stephen D. McDowell, *Introduction to the Special Forum on Monetization of User-Generated Content—Marx Revisited*, 31 INFO. SOC'Y 1 (2015).

³ There are different perspectives to monetization which may influence how the concept is defined and framed. The recent example of Twitter subscriptions shows the platform perspective. See Clare Duffy, *Elon Musk Has Upended Twitter's Business. Here's How He Could Fix It*, CNN BUS. (Nov. 22, 2022), <https://edition.cnn.com/2022/11/22/tech/elon-musk-twitter-subscription-business/index.html>.

⁴ In spite of this perception, media scholarship has shown that the vulnerability and volatility of labor challenges the democratization paradigm. See, e.g., BROOKE ERIN DUFFY, (NOT) GETTING PAID TO DO WHAT YOU LOVE: GENDER, SOCIAL MEDIA, AND ASPIRATIONAL WORK (2017).

⁵ Catalina Goanta & Sofia Ranchordás, *The Regulation of Social Media Influencers: An Introduction*, in *THE REGULATION OF SOCIAL MEDIA INFLUENCERS* 1 (Catalina Goanta & Sofia Ranchordás eds., 2020).

and content moderation received much scrutiny for both the individual and societal implications of platform governance.⁶ Yet in spite of the fundamental ways in which content monetization currently affects moderation policy and practice, and creates tensions between different fundamental rights of creators and audiences, the constitutional questions of content monetization remains generally understudied.⁷ This work aims to provide a better understanding of content moderation by social media platforms, with a focus on content monetization. Particularly, the booming content-creator economy sheds light on a particular angle of platform governance that focuses on monetizing users, namely that of individuals who can make impressive jumps from amateur to professional content creators and thus generate revenue for themselves on the Internet. This essay places the creator's perspective at the heart of the discussion.

In this short essay we shape a conceptual framework for content monetization. We do so in two acts. Firstly, we define content monetization and discuss it within the broader context of web monetization. In this part we also present a state-of-the-art overview of business models which we deem to fall under content monetization, based on our own research. Secondly, we address what we perceive to be a paradigm shift in content moderation: considering speech as monetized content. As content monetization permeates more aspects of our digital lives, such as information about who we vote for or what we think about public policy,⁸ we need to be increasingly aware of the constitutional

⁶ See, e.g., Jack M. Balkin, Symposium, *Free Speech Is A Triangle*, 118 COLUM. L. REV. 47 (2018); Kyle Langvardt, *Regulating Online Content Moderation*, 106 GEO. L.J. 1353 (2017); Rebecca Tushnet, *Content Moderation in an Age of Extremes Essay*, 10 CASE WESTERN RESERVE J. L., TECH., & INTERNET 1 (2019); Niva Elkin-Koren, Giovanni De Gregorio & Maayan Perel, *Social Media as Contractual Networks: A Bottom up Check on Content Moderation*, 107 IOWA L. REV. 987 (2021); GIOVANNI DE GREGORIO, DIGITAL CONSTITUTIONALISM IN EUROPE: REFRAMING RIGHTS AND POWERS IN THE ALGORITHMIC SOCIETY (2022).

⁷ Catalina Goanta et al., *Web Monetization*, 11 INTERNET POL'Y REV. (Mar. 31, 2022), <https://policyreview.info/glossary/web-monetisation>.

⁸ Exploring the risks and harms of content monetization is outside of the scope of this short essay. For more information on the legal implications of user harms, see, for instance, Laura Aade et al., *Written Evidence Submitted for an Influencer Culture Inquiry*, U.K. DIGIT., CULTURE, MEDIA & SPORT COMM. (May 7, 2021), <https://committees.parliament.uk/writtenevidence/35423/html>; Daniel Ershov & Matthew Mitchell, *The Effects of Advertising Disclosure Regulations on Social Media: Evidence from Instagram* (May 23, 2021), <https://wilte.wordpress.com/2021/09/29/the-effects-of-advertising-disclosure-regulations-on-social-media-evidence-from-instagram>; Frithjof Michaelsen & Luena Collini et al., *The Impact of Influencers on Advertising and Consumer Protection in the Single Market*, INTERNAL MKT. & CONSUMER PROT. (IMCO) COMM., EUR. PARL. (Feb. 2022), [https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703350/IPOL_STU\(2022\)703](https://www.europarl.europa.eu/RegData/etudes/STUD/2022/703350/IPOL_STU(2022)703)

tensions emerging from this practice and the limits between the commercial and the political in content monetization.

I. Framing Content Monetization

If we look at the Internet as a whole, content monetization can be considered a subset of the wider concept of “web monetization.” In a nutshell, monetization entails making money out of something, generating revenue.⁹ The history of internet advertising dates back to the early days of the internet, when banner ads were first introduced.¹⁰ These ads were simple graphical banners that were displayed on web pages, and they were used to promote products or services. Over time, Internet advertising has evolved to become more sophisticated and effective, with the use of technologies such as cookies and tracking pixels to collect data on users and target ads more effectively. Today, internet advertising is a multibillion-dollar industry, and it continues to evolve as new technologies and platforms emerge. It is an essential part of the digital economy, and it plays a key role in how businesses reach and engage with consumers online.

Yet advertising led to much more than pixel-renting. By using information-transfer protocols for data collection, advertising has supported the development of a considerable world market for profiling user behavior. Companies behind most of the advertising on the Internet (e.g., Google and Facebook) were thus able to centralize their power. In the process, the pitfalls of too much centralized power led to new data-sharing architectures, such as Tim Berners-Lee’s Solid project,¹¹ aimed to redesign business incentives on the Internet using decentralized structures. Similarly, the Web Monetization protocol, a proposed Application Programming Interface standard that promoted

[350_EN.pdf](#); Laura Clausen & Christine Riefa, *Towards Fairness in Digital Influencers’ Marketing Practices*, 8 J. EUR. CONSUMER & MKT. L. 64 (2019); and Jan Trzaskowski, *Identifying the Commercial Nature of ‘Influencer Marketing’ on the Internet*, 65 SCANDINAVIAN STUD. L. 81 (2018).

⁹ See Goanta et al., *supra* note 7.

¹⁰ See, e.g., Patrick Dawson & Michael Lamb, *Enhanced Success with Programmatic Social Advertising*, in PROGRAMMATIC ADVERTISING 103 (Oliver Busch ed., 2016); Jeannie Marie Paterson et al., *The Hidden Harms of Targeted Advertising by Algorithm and Interventions from the Consumer Protection Toolkit*, 9 INT’L J. CONSUMER L. & PRAC. 1 (2021); Shuai Yuan, Jun Wang & Xiaoxue Zhao, *Real-Time Bidding for Online Advertising: Measurement and Analysis*, ADKDD ’13: PROC. SEVENTH INT’L WORKSHOP ON DATA MINING FOR ONLINE ADVERT. (Aug. 2013), <http://dl.acm.org/citation.cfm?doid=2501040.2501980>.

¹¹ SOLID, <https://solid.mit.edu> (last visited Dec. 4, 2022).

micropayments upon website browsing, is another example of the more recent decentralization directions taken by web monetization.¹²

While monetization on the web was developing and changing, monetization on social media, from the perspective of the individual user, started emerging when online popularity became a commodity for native advertising.¹³ Celebrities, such as soccer players, models, or reality TV stars who were already benefiting from offline popularity, managed to inhabit their online presences with the same attention from fans and followers. The now infamous example of why online popularity became an asset for brands and advertisers is best reflected by the Fyre Festival saga.¹⁴ The Fyre Festival was a music festival that was held in the Bahamas in 2017. The festival was promoted heavily on social media by a number of mega-influencers, who were paid to promote it to their followers. The role of influencers in the Fyre Festival was significant, as they were instrumental in promoting the event and attracting attendees. However, their involvement also highlighted some of the ethical issues surrounding influencer marketing, such as the need for transparency and the potential for deceptive practices. The Fyre Festival ultimately served as a cautionary tale for both influencers and their audiences, and it sparked a broader conversation about the role of influencers in the digital economy.

By populating their feeds with advertising as content, mega-influencers showed the potential success of electronic word-of-mouth advertising in parasocial relations.¹⁵ Differently put, the unilateral bond

¹² WEB MONETIZATION, <https://webmonetization.org> (last visited Feb. 19, 2023).

¹³ See Bartosz W. Wojdyski & Guy J. Golan, *Native Advertising and the Future of Mass Communication*, 60 AM. BEHAV. SCI. 1403 (2016); Bartosz W. Wojdyski & Nathaniel J. Evans, *Going Native: Effects of Disclosure Position and Language on the Recognition and Evaluation of Online Native Advertising*, 45 J. ADVERT. 157 (2016); Catalina Goanta, *Human Ads Beyond Targeted Advertising*, VERFASSUNGSBLOG (Sept. 5, 2021), <https://verfassungsblog.de/power-dsa-dma-11>.

¹⁴ See April Newton, *Conflict of Interest in the Fyre Festival Documentaries: For Media Ethics, Cases and Controversies*, J. MEDIA ETHICS (2020), <https://www.tandfonline.com/doi/full/10.1080/23736992.2020.1833729>.

¹⁵ See, e.g., Ana Babić Rosario, Kristine de Valck & Francesca Sotgiu, *Conceptualizing the Electronic Word-of-Mouth Process: What We Know and Need to Know About eWOM Creation, Exposure, and Evaluation*, 48 J. ACAD. MKTG. SCI. 422 (2020); Mira Lee & Seounmi Youn, *Electronic Word of Mouth (eWOM): How eWOM Platforms Influence Consumer Product Judgement*, 28 INT'L J. ADVERT. 473 (2009); Sun-Jae Doh & Jang-Sun Hwang, *How Consumers Evaluate eWOM (Electronic Word-of-Mouth) Messages*, 12 CYBERPSYCH. BEHAV. 193 (2009); Shu-Chuan Chu & Yoojung Kim, *Determinants of Consumer Engagement in Electronic Word-of-Mouth (eWOM) in Social Networking Sites*, 30 INT'L J. ADVERT. 47 (2011); Amanda N. Tolbert & Kristin L. Drogos, *Tweens' Wishful Identification and Parasocial Relationships with YouTubers*, 10 FRONTIERS PSYCH. 2781 (2019); Chen Lou & Hye Kyung Kim, *Fancying the New Rich and Famous? Explicating the*

between a fan and their idol or perceived friend, driven by trust, relatability, authenticity, and aspiration, is a highly fertile ground for persuasion. The emerging socialization as advertising has been labeled as “influencer marketing,”¹⁶ a monetization business model bringing together influencers and brands in a mediated or unmediated manner, for the purpose of advertising, namely promoting goods and services on social media platforms.

Influencer marketing opened the doors to monetization options for the internet entrepreneur and set out a trajectory for content monetization, which we can define as the process of generating revenue from social media content. The goal of content monetization is to turn content into a source of income for the creator or owner. This is often done with the help of tools, intermediaries and platforms that enable content creators to easily manage and track their revenue streams.¹⁷

In the following section, we offer an overview of content monetization practices, which we refer to as business models, from the perspective of content creators. These practices are mercurial, just like the broader social media economy of which they are part. Even the term referring to the beneficiaries of these forms of revenue has suffered changes in the past years, moving from “influencer” to “content creator.” Influencers can be seen as a subset of content creators focusing on advertising business models, who, in the process, got a bad reputation for doing so, particularly due to issues relating to hidden advertising. By contrast, content creators engage in cultural production.¹⁸ This distinction is particularly important since regulatory discussions surrounding the definition of influencers need to account for the wide variety of monetization models that underlie social media content creation.

Roles of Influencer Content, Credibility, and Parental Mediation in Adolescents' Parasocial Relationship, Materialism, and Purchase Intentions, 10 FRONTIERS PSYCH. 2567 (2019).

¹⁶ See Laura E. Bladow, *Worth the Click: Why Greater FTC Enforcement Is Needed to Curtail Deceptive Practices in Influencer Marketing*, 59 WM & MARY L. REV. 1123 (2017); Marijke De Veirman, Liselot Hudders & Michelle R. Nelson, *What Is Influencer Marketing and How Does It Target Children? A Review and Direction for Future Research*, 10 FRONTIERS PSYCH. 2685 (2019).

¹⁷ See Sophie Bishop, *Influencer Management Tools: Algorithmic Cultures, Brand Safety, and Bias*, 7 SOC. MEDIA + SOC'Y 205630512110030 (2021).

¹⁸ See STUART CUNNINGHAM & DAVID RANDOLPH CRAIG, *SOCIAL MEDIA ENTERTAINMENT: THE NEW INTERSECTION OF HOLLYWOOD AND SILICON VALLEY* (2019); see also Catalina Goanta & Giovanni de Gregorio, *Content Creator/Influencer*, in *Glossary of Platform Law and Policy Terms* (Luca Belli, Nicolo Zingales & Yasmin Curzi eds., Dec. 17, 2021), <https://platformglossary.info/content-creator-influencer>; Sophie Bishop, *Name of the Game*, REAL LIFE (June 14, 2021), <https://reallifemag.com/name-of-the-game>.

2. The Business Models of Content Monetization by Content Creators

The past few years have seen fundamental changes in the commercial activity of content creators, who are beginning to be seen as a more mature category of social media stakeholders, who are opening new horizons for brands, platforms, and users.¹⁹ Content creators now come in many different sizes, pertaining to a wide variety of industries, and splitting their activity across a number of social media platforms.²⁰ Their business models can be generally divided into four categories. While business models may change at a fast pace, this taxonomy reflects the most relevant and up-to-date categorization of revenue streams in the creator economy:²¹ 1) revenue from brands; 2) revenue from platforms; 3) (unmediated) revenue from peers; and 4) direct selling.

Revenue from brands entails a type of revenue resulting from advertising agreements made off-platform between creators and brands, often referred to as the influencer marketing phenomenon discussed in the earlier section. Such revenue can be generated through various practices, such as endorsements, affiliate marketing, and barter.

Revenue from platforms has been traditionally prevalent on specific platforms (e.g., YouTube), but is now gaining broader popularity through additional models. Other practices have gained traction as well, such as subscriptions (e.g., Twitch), crowdfunding services (e.g., GoFundMe or Patreon), tokenization (allowing users to buy tokens to facilitate ad-hoc micropayments to reward activities such as streaming), or creator funds (e.g., TikTok).²²

¹⁹ The data company SignalFire best reflects this transition in their 2019 map of the content creation economy, acknowledging three specific phases in the development of this economy in the past decade: the birth of social media platforms; influencer marketing; and content creators as small and medium businesses. See Yuanling Yuan & Josh Constone, *SignalFire's Creator Economy Market Map*, SIGNALFIRE, <https://signalfire.com/blog/creator-economy> (last accessed Oct. 1, 2022).

²⁰ See Kelly Ehlers, *Council Post: Micro-Influencers: When Smaller Is Better*, FORBES (June 2, 2021), <https://www.forbes.com/sites/forbesagencycouncil/2021/06/02/micro-influencers-when-smaller-is-better>.

²¹ See Giovanni De Gregorio & Catalina Goanta, *The Influencer Republic: Monetizing Political Speech on Social Media*, 23 GER. L.J. 204 (2022); see also Catalina Goanta & Isabelle Wildhaber, *In the Business of Influence: Contractual Practices and Social Media Content Monetisation*, 91 Schweizerische Zeitschrift für Wirtschafts- und Finanzmarktrecht 346 (2019), https://www.alexandria.unisg.ch/259558/1/02_SZW_4-2019_Goanta_Wildhaber.pdf.

²² *TikTok Creator Fund: Your Questions Answered*, TIKTOK (Mar. 25, 2021), <https://newsroom.tiktok.com/en-gb/tiktok-creator-fund-your-questions-answered>.

An important aspect about revenue from platforms is that such revenue is always mediated by platforms, and creators thus become dependent on platforms for it. This shows a clear shift in social media strategies. Earlier on, platforms attempted to capture the attention of individual users. Nowadays, creators have become honeypots attracting their own followers, which has changed the nature of their interaction with platforms. Most recently, this business model also includes an attempt by platforms to reign in influencer marketing. For instance, TikTok's Branded Missions reflect an influencer marketplace aimed at mediating brand deals between brands and influencers willing to engage in native advertising. As part of the payment, TikTok also offers free views to the influencers who are selected for payment upon the brand's agreement.²³

Unmediated revenue from peers reflects transactions which are supported via decentralized payment architectures, such as the Web Monetization protocol or the Brave Rewards program of the Brave browser.²⁴ These payments generally also entail micropayments and are supposed to help normalize the notion of paying for content on the internet to support creators.

Lastly, direct selling is a model whereby influencers develop their own products or services which they sell to their followers. The difference between direct selling and influencer marketing is that when creators advertise their own products, they become sellers in contracts with consumers (and thus have additional obligations as contracting parties, whereas in the latter situation they are mere advertisers).

The relevance of mapping business models should not be underestimated. The latest Forbes list of top content creators for 2022 shows a consistent trend that creators are increasingly relying on a combination of the business models enumerated above.²⁵ In doing so, creators build complex labor portfolios which allow them to spread the risk of platform volatility and discretionary moderation.²⁶

Charli D'Amelio, one of TikTok's most popular stars, engages in influencer marketing, receives tokens from fans during live streams, sells

²³ *Introducing TikTok Branded Mission: Inspiring Brand and Creator Collaborations*, TIKTOK (May 18, 2022), <https://newsroom.tiktok.com/en-us/introducing-tiktok-branded-mission-inspiring-brand-and-creator-collaborations>.

²⁴ WEB MONETIZATION, *supra* note 12.

²⁵ Alexandra Sternlicht, *Top Creators 2022*, FORBES (Sept. 6, 2022), <https://www.forbes.com/sites/alexandrasternlicht/2022/09/06/top-creators-2022>.

²⁶ See Robyn Caplan & Tarleton Gillespie, *Tiered Governance and Demonetization: The Shifting Terms of Labor and Compensation in the Platform Economy*, 6 SOC. MEDIA SOC. 205630512093663 (2020).

clothing, and even owns an early-stage VC fund.²⁷ Mr. Beast, currently YouTube's most popular creator, monetizes his activity—amongst others—using the platform's advertising system (AdSense), engages in influencer marketing, and even opened a “virtual restaurant” called Mr. Beast Burger.²⁸ These are some landmark illustrations of the commercial work of content creators.

However, creator work extends well beyond advertising, entertainment, and product development. Research has shown that socially disruptive conspiracy theories are also monetizable,²⁹ often to the detriment of the already vulnerable audiences who believe that the Earth is flat or that Hillary Clinton is an alien. The success of content monetization is thus affecting other corners of social media which we would be more prone to associate with freedom of expression, such as when creators express political views or support electoral candidates. Another creator featured in the Forbes list is Elliot Tebele, known for his popular Instagram meme curation account under the name of “FuckJerry.”³⁰ Tebele was the mastermind behind Mike Bloomberg's U.S. presidential campaign,³¹ encouraging particularly the younger, meme-savvy electorate to vote for Bloomberg. This campaign is basically an example of political influencer marketing,³² which is becoming so popular that now marketing agencies are specializing in this type of advertising, and governments around the world employ influencers as public policy persuasion vehicles.³³

3. Speech as Monetized Content: Between Commerce and Politics

²⁷ See Sternlicht, *supra* note 25.

²⁸ See *id.*

²⁹ See Cameron Ballard et al., *Conspiracy Brokers: Understanding the Monetization of YouTube Conspiracy Theories*, in PROCEEDINGS OF THE ACM WEB CONFERENCE 2022, at 2707 (Apr. 25, 2022), <https://dl.acm.org/doi/10.1145/3485447.3512142>.

³⁰ See Sternlicht, *supra* note 25.

³¹ See Taylor Lorenz, *Michael Bloomberg's Campaign Suddenly Drops Memes Everywhere*, N.Y. TIMES (Feb. 13, 2020), <https://www.nytimes.com/2020/02/13/style/michael-bloomberg-memes-jerry-media.html>.

³² See Magdalena Riedl et al., *The Rise of Political Influencers—Perspectives on a Trend Towards Meaningful Content*, 6 FRONTIERS COMM'N 752656 (2021); E. Byrne, J. Kearney & C. MacEvilly, *The Role of Influencer Marketing and Social Influencers in Public Health*, 76 PROC. NUTRITION SOC'Y E103 (2017).

³³ Stephanie Lai, *Campaigns Pay Influencers to Carry Their Messages, Skirting Political Ad Rules*, N.Y. TIMES (Nov. 2, 2022), <https://www.nytimes.com/2022/11/02/us/elections/influencers-political-ads-tiktok-instagram.html>.

The current system of content monetization primarily concerns speech. It is one of the examples of where market meets democracy and lines become blurred between market goals and the protection of constitutional rights. Content is not a product which can be addressed only by relying on the tools of product safety or consumer law. It also represents expressions of users, thus acquiring a constitutional value. Monetizing from content affects how ideas and opinions flow online. The case of “disinformation for hire” has increasingly spread through influencers.³⁴ Disinformation about COVID-19 vaccination is only one example of the questions raised by the monetization of harmful content.

The rise of influencer marketing, as well as other non-advertising-related monetization activities of content creators, has underlined this constitutional tension in content monetization. Influencers do not limit their activities to advertise products or promote themselves, but rather they increasingly engage with political topics, including areas of public interest.³⁵ For instance, the advertisement of a bag could also turn into a call for animal rights, the sharing of reviews on a new private transport can turn into a critique of the public system, or even our own body and image can become a political manifesto for diversity and to tackle discrimination. Even if this is not necessarily a harmful trend, this situation makes particularly difficult not only applying legal standards to commercial speech when this form of expression turns into political speech.

The relationship between commercial and political speech is not straightforward.³⁶ Even if courts in Europe and U.S. have not drawn a clear line between these two forms of expression, constitutional democracies tend to recognize less protection to commercial speech compared to political speech.³⁷ It is not unusual to find restrictions to speech related to the advertisement of tobacco products or alcoholic drinks, and this trend can also be examined when looking at other fields such as geographical indications. The same consideration does not fully extend to political speech, which is the foundation of constitutional democracies. However, forms of expression like commercial

³⁴ See Max Fisher, *Disinformation for Hire, A Shadow Industry, Is Quietly Booming*, N.Y. TIMES (July 25, 2021) <https://www.nytimes.com/2021/07/25/world/europe/disinformationsocial-media.html>.

³⁵ See Lai, *supra* note 33 (“The Democratic Majority Action PAC has focused its efforts on congressional races in Wisconsin and Pennsylvania, offering influencers between \$300 and \$500 per post.”).

³⁶ See EUGENE VOLOKH, *THE FIRST AMENDMENT* (2001).

³⁷ See ROGER A. SHINER, *FREEDOM OF COMMERCIAL EXPRESSION* (2003); Alex Kozinski & Stuart Banner, *Who’s Afraid of Commercial Speech?*, 76 VA. L. REV. 627 (1990).

communications, or generally speech, which, for some constitutional democracies, fall within the umbrella of freedom of speech, in other states, may not be given the same relevance.³⁸ The different values around free speech as also conditioned by moral and/or socio-political considerations are the reasons for different degrees of constitutional protection.³⁹

The blurring line between political and commercial speech introduces a new layer of complexity in content monetization. It is challenging to define expressions as commercial when they discuss political topics or topics in the general public interest.⁴⁰ Indeed, political speech is likely to pull commercial speech inside a broader scope of protection (i.e., magnetic effect), with the result that potential limitations of this kind of speech would be required to pass a strict balancing test that weighs other constitutional safeguards or legitimate interests. In other words, when the market economy meets the marketplace of ideas, it is not easy to draft a clear line between the two dimensions. This framework also increases the obstacles to address the monetization of harmful content dealing with topics in the public interest. In other words, the protection of political speech contributes to extending the protection of commercial speech, thus limiting the possibilities to tackle misleading forms of commercial speech and their monetization.

In practice, whenever an influencer also engages with topics of public interest, such as environmental issues or a global pandemic, but still advertises their products and monetizes from this activity, we are addressing the constitutional question of content monetization. Indeed, the magnetic effect attracting commercial speech into the framework of political speech raises questions on how to address the boundaries between commercial and political and how to limit the exploitation of this relationship, as particularly underlined by the case of “disinformation for hire” and generally by the spread of disinformation and misinformation on social media.

While lucrative and attractive for freelancers who want to use their creative talents for entertainment through content creation, social media influencing is often affiliated with dangers arising out of manipulative behavior that has an undisclosed commercial intent. If a fitness influencer

³⁸ See, e.g., RONALD J. KROTOSZYNSKI, *THE FIRST AMENDMENT IN CROSS-CULTURAL PERSPECTIVE* (2006); Ronald A. Cass, *Commercial Speech, Constitutionalism, Collective Choice*, 56 U. CINCINNATI L. REV. 1383 (1988).

³⁹ See MARTIN H. REDISH, *THE ADVERSARY FIRST AMENDMENT: FREE EXPRESSION AND THE FOUNDATIONS OF AMERICAN DEMOCRACY* (2013).

⁴⁰ See Robert C. Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1 (2000).

hides the fact that his physique is built on steroid injections in order to sell his own fitness supplements,⁴¹ his followers will be more prone to buy these supplements as aspirational products.⁴²

So far, advertising laws adopted to protect consumers dictate that commercial communication must be disclosed, and European reforms on platform governance further crystalize disclosure duties—for example, the Digital Services Act.⁴³ The exponentially increasing complexity of supply chains and stakeholders partaking in online private ecosystems mirrors an increasing lack of coherence in the interplay of various rules at different governance levels. However, the European approach is only an exception. Most of the content monetization system of governance is primarily governed by contracts and rules defined by social media platforms.⁴⁴ In this case, the future of content monetization is increasingly shaped by multiple trends across platform governance and different approaches to the law and policy of advertising.

4. The Governance of Content Monetization

In the last years, the monetization of content has received increasing attention from regulators around the world, for instance in addressing the need to protect vulnerable groups like children.⁴⁵ In the consumer space alone, monetization has led to alarming enforcement questions for consumer law, as detection at scale remains very difficult to achieve for public authorities: influencers are too many to keep track of, and digital monitoring is lagging behind.⁴⁶ In other words, while in enforcement practice it may already be difficult to distinguish an ad—which needs disclosure—from a personal post by a content creator, it is even more

⁴¹ See Geoff Weiss, *The Liver King, An Influencer Who Eats Raw Meat and Preaches A Primal Lifestyle, Admits to Lying About Steroid Use*, INSIDER (Dec. 2, 2022), <https://www.insider.com/influencer-the-liver-king-raw-diet-admits-steroid-use-2022-12>.

⁴² See De Veirman, Hudders & Nelson, *supra* note 16.

⁴³ Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act), 2022 O.J. (L 277) 1. Article 26 deals with the transparency of advertising, which only applies to influencer marketing business models that are mediated by platforms.

⁴⁴ See Elkin-Koren, De Gregorio & Perel, *supra* note 6.

⁴⁵ See Sophie C. Boerman & Eva A. van Reijmersdal, *Disclosing Influencer Marketing on YouTube to Children: The Moderating Role of Para-Social Relationship*, 10 FRONTIERS PSYCH. 3042 (2020).

⁴⁶ See Bladow, *supra* note 16; Lou & Kim, *supra* note 15; Delia Cristina Balaban, Meda Mucundorfeanu & Larisa Ioana Mureșan, *Adolescents' Understanding of the Model of Sponsored Content of Social Media Influencer Instagram Stories*, 10 MEDIA & COMMUN 305 (2022).

challenging to draw a line between a commercial and a political post, where creators amplify political campaigns.⁴⁷

During the pandemic, a lot of governments around the world used social media influencers to raise awareness about the importance of vaccination and social distancing.⁴⁸ Setting aside the importance of public policy objectives, without the disclosure of contracts between the government and influencers, audiences were only able to perceive that whatever statements such influencers would make on the pandemic would be their own opinions and stances. This led to some awkward situations when, months later, some influencers pivoted on their contractual obligations, and started promoting completely opposite messages relating to these public policies (e.g., changing their mind about supporting social distancing), leaving audiences in disbelief as to their real opinions on the matter.⁴⁹

These challenges are also related to the private governance of content monetization. As private entities, platforms have the freedom of contract to set out the terms of the transactional relationship pursued with its users, thus governing content by a mix of technical and private norms. The liberal approach adopted at the end of the last century enabled social media platforms to develop without any considerable legal limitations aimed specifically at online transactions and other activities. In addition to this, limited information literacy and available resources, as well as legal uncertainty around the applicability of old rules to new technologies, have led to a slow, and mostly reactive approach to the enforcement of the law. In this space, social media platforms, able to control users at scale, consolidated their own community guidelines in relation to user behavior in areas of public contention, such as criminal activities (e.g., terrorism content or child pornography) or intellectual property infringements, to the detriment of other areas where conduct standards could also be developed (e.g., consumer protection).⁵⁰ As public enforcement is lagging behind, private regulation plays a highly important role in the monitoring of monetized content.

⁴⁷ See Riedl et al., *supra* note 32; De Gregorio and Goanta, *supra* note 21.

⁴⁸ See Taylor Lorenz, *To Fight Vaccine Lies, Authorities Recruit an 'Influencer Army,'* N.Y. TIMES (Aug. 1, 2021), <https://www.nytimes.com/2021/08/01/technology/vaccine-lies-influencer-army.html>.

⁴⁹ Sebastiaan Quekel, *Famke Louise Heeft Geen Spijt: 'Mensen Hebben Hun Vrijheid Nodig En Willen Plezier Maken,'* AD.NL (Sept. 22, 2020), <https://www.ad.nl/show/famke-louise-heeft-geen-spijt-mensen-hebben-hun-vrijheid-nodig-en-willen-plezier-maken~a9d30b0a>.

⁵⁰ See, e.g., *Community Guidelines*, TIKTOK, <https://www.tiktok.com/community-guidelines?lang=en> (last visited Mar. 10, 2023).

In these spaces governed by different standards, the monetization of political speech raises questions on how to address the overlap between market and democracy. In the European framework, the Digital Services Act has been just a first step to address the challenges of content moderation on social media. The European Commission has also launched a new proposal on transparency and targeting of political advertising.⁵¹ These rules will require more transparency in the dissemination of any political ad. They will need to be clearly labeled and include information about the source and the amount paid.⁵²

Nonetheless, the magnetic effect can play a different role due to the different constitutional values. Consumer law in Europe could play an important role in coordinating the relationship between market and democracy. This role would result from the different constitutional approach to freedom of expression in Europe. In the U.S. framework, the broad protection of the First Amendment driving the scope of consumer law could lead to an increasing attraction of commercial speech within the framework of political speech without recognizing rights of users to understand and challenge deceptive behaviors. Some saving grace might come from the proposed Honest Ads Act, aimed at requiring online political advertising to adhere to similar disclosure requirements as TV, radio and print advertising.⁵³ More specifically, in electoral law, the Federal Election Commission (FEC) just proposed a rule that would lead to the disclosure of political advertising online, under the labels of “paid by.” As the rule has already come under fire, it remains to be seen to what extent the U.S. legislature will follow the transparency trends proposed by European Union reforms.

Content monetization underlines the complicated relationship between commercial and political speech in the digital age. The creation and expansion of new business models to monetize content and the growth of influencer marketing have amplified the traditional questions related to the boundaries between market and democracy. This effect provides a critical angle to reflect on how commercial speech addressing topics in the public interest can be exploited to access a broader protection

⁵¹ Proposal for a Regulation of the European Parliament and of the Council on the Transparency and Targeting of Political Advertising, COM (2021) 731 final (Dec. 13, 2022).

⁵² *Id.* art. 5.

⁵³ See Press Release, Amy Klobuchar, Senator, Klobuchar, Graham, Warner Introduce Bipartisan Legislation to Improve Transparency and Accountability of Online Political Advertising (Sept. 30, 2022), <https://www.klobuchar.senate.gov/public/index.cfm/2022/9/klobuchar-graham-warner-introduce-bipartisan-legislation-to-improve-transparency-and-accountability-of-online-political-advertising>.

and escape the limits imposed by regulation of commercial speech. This challenge is increasingly relevant when looking at the possibility to monetize from content that can be considered as unlawful. The framework discussed above raises constitutional questions for constitutional democracies. The differences across the protection of freedom of expression across the Atlantic are leading towards a situation where, the protection of the First Amendment could amplify this challenge in the US framework, while in the EU, consumer protection is expanding through new legislation addressing content monetization in platform governance and political advertising.