

Contracting With AI - Should This Be Allowed?

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The world has seen numerous changes in technology over the past few years, from self-driving cars, to contactless payment methods, to AI. In more recent years, AI has become a major topic of conversation, largely from ChatGPT, which allows human-like conversations with anything from a chatbot.¹ People are not only using AI to create contracts, but are now contracting with AI personalities themselves in the form of brand deals.² To form an opinion on whether this kind of contract should be allowed, we have to begin with discussing what an AI influencer is, and what it means to form a contract.

AI stands for artificial intelligence, which is a process which machines use to mimic the “human intelligence process.”³ AI can be used for many different reasons, such as creating algorithms and generating images and music.⁴ In more recent history, people have started using AI to create artificial personalities, which are similar to internet personalities seen online every day. An internet personality is someone who uses the internet to showcase events taking place in their life.⁵ Some notable internet personalities include Dixie D’Amelio from TikTok, Markiplier from YouTube, and Zach King from Instagram.⁶ AI virtual influencers are similar to these internet personalities, except for one key fact, they are not real people.

Virtual influencers are growing in popularity due to the fact that they have “realistic characteristics, features and personalities of humans.”⁷ Some notable virtual influencers include Noonouri⁸, Lil Miquela⁹, and Shudu.¹⁰ While the virtual influencers themselves are not human, there are real people, behind the scenes, making the decisions for them.¹¹ Not only do these people make all the decisions, but they also get to receive all the profits.¹² Virtual influencers

¹ Sabrina Ortiz, *What is ChatGPT and why does it matter? Here's what you need to know*, ZDNET: THE RISE OF GENERATIVE AI, (Sept. 15, 2023) <https://www.zdnet.com/article/what-is-chatgpt-and-why-does-it-matter-heres-everything-you-need-to-know/>.

² Jasmine Sheena, *Brands are still figuring out virtual influencers*, Marketing Brew (Sept. 12, 2023), <https://www.marketingbrew.com/stories/2023/09/12/brands-are-still-figuring-out-virtual-influencers>.

³ Ed Burns, Nicole Laskowski & Linda Tucci, *artificial intelligence*, TechTarget (July 2023), <https://www.techtarget.com/searchenterpriseai/definition/AI-Artificial-Intelligence>.

⁴ *Id.*

⁵ *Internet-personality Definition*, YOURDICTIONARY, <https://www.yourdictionary.com/internet-personality>

⁶ *Social Media Stars*, THE FAMOUS PEOPLE, <https://www.thefamouspeople.com/list-of-social-media-stars.php> (last visited Sept. 17, 2023).

⁷ Megan Mosley, *Virtual Influencers: What Are They & How Do They Work?*, INFLUENCER MATCHMAKER, <https://influencermatchmaker.co.uk/news/virtual-influencers-what-are-they-how-do-they-work> (last visited Sept. 17, 2023).

⁸ Bernard Marr, *Virtual Influencer Noonouri Lands Record Deal: Is She The Future Of Music?*, FORBES, (Sept. 5, 2023), <https://www.forbes.com/sites/bernardmarr/2023/09/05/virtual-influencer-noonouri-lands-record-deal-is-she-the-future-of-music/?sh=71bd2347536c>.

⁹ Megan Mosley, *Virtual Influencers: What Are They & How Do They Work?*, INFLUENCER MATCHMAKER, <https://influencermatchmaker.co.uk/news/virtual-influencers-what-are-they-how-do-they-work> (last visited Sept. 17, 2023).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

who are involved in brand deals are created by people who contract with a company to advertise.¹³ This is the alternative to a brand creating their own virtual influencer.¹⁴

Chances are you have probably seen a virtual influencer online, whether it was on social media or in an ad. In 2016 for example, virtual influencer Lil Miquela took social media by storm, with people debating whether or not she was a real person.¹⁵ Since then, virtual influencers have grown in popularity with brands. These brands use these influencers to promote themselves and advertise¹⁶, some even without knowing whether they are dealing with a real person or a virtual personality created by a real person.¹⁷ The next step in forming an opinion on these virtual influencers contracts, is to learn more about contracts in general and the brand deals these influencers are involved in.

The Second Restatement of Contracts defines a contract as “a promise or a set of promises for the breach of which the law gives a remedy.”¹⁸ This means that to form a contract, you need a promise, which is backed by a potential remedy from the law. The contracts being formed with AI influencers are ones known as “brand deals.”¹⁹ Well-known companies, like Amazon and Nike, participate in brand deals with popular internet personalities to advertise their products.²⁰ More specifically, a brand deal “is a campaign that a brand and an influencer or blogger work together on.”²¹ With a brand deal, an influencer shares a product from a brand with their following, in hopes that this will influence them to buy the product or support the product’s brand.²² In return, the brand may send the influencer free products, payments, or a combination of the two.²³

Well-known brands are now using the services of virtual influencers for modeling and product advertisement.²⁴ Recently, these contracts with virtual personalities have expanded past simple brand deals. As seen in recent news, Warner Music signed their first virtual artist, Noonnoori²⁵. Noonnoori soon thereafter released her first single, and the royalties are reported to

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Jasmine Sheena, *Brands are still figuring out virtual influencers*, Marketing Brew (Sept. 12, 2023), <https://www.marketingbrew.com/stories/2023/09/12/brands-are-still-figuring-out-virtual-influencers>.

¹⁶ Grace Macaskill, *It’s Molly M-AI! Meet the AI influencers ALREADY making millions from mega deals with fashion giants – could you tell they don’t exist?*, THE US SUN (Aug. 2, 2023, 7:36 ET), <https://www.the-sun.com/tech/8725778/ai-influencers-fashion-deals/>

¹⁷ Jenna Rosenstein, *People Can’t Tell If This Fenty Model Is Real Or Fake*, BAZAAR (Feb. 9, 2018), <https://www.harpersbazaar.com/beauty/makeup/a16810663/shudu-gram-fenty-model-fake/>

¹⁸ Restatement (Second) of Contracts §§ 1-2, 178 (AM. L. INST. 1981).

¹⁹ Cait Minschy, *How Do Brand Deals with Influencers Work?*, CAIT MINSCHY: LIFESTYLE BLOG, (June 24, 2021), <https://caitminschy.com/how-do-brand-deals-with-influencers-work/>.

²⁰ Gabby, *50 Popular Youtuber Brand Deals*, VlogFund (Nov. 23, 2018), <https://www.vlogfund.com/en/blog/popular-youtuber-brand-deals/>

²¹ Cait Minschy, *How Do Brand Deals with Influencers Work?*, CAIT MINSCHY: LIFESTYLE BLOG, (June 24, 2021), <https://caitminschy.com/how-do-brand-deals-with-influencers-work/>.

²² *Id.*

²³ *Id.*

²⁴ Jasmine Sheena, *Brands are still figuring out virtual influencers*, Marketing Brew (Sept. 12, 2023), <https://www.marketingbrew.com/stories/2023/09/12/brands-are-still-figuring-out-virtual-influencers>.

²⁵ Bernard Marr, *Virtual Influencer Noonnoori Lands Record Deal: Is She The Future Of Music?*, FORBES, (Sept. 5, 2023), <https://www.forbes.com/sites/bernardmarr/2023/09/05/virtual-influencer-noonnoori-lands-record-deal-is-she-the-future-of-music/?sh=71bd2347536c>.

be split between her creator, Warner, and the other artist on the song²⁶. This deal has now expanded the kinds of contracts in which virtual personalities are involved in, and opened the door to more questions concerning where the line will be drawn on contracting with virtual personalities.

This process of contracting with AI influencers, in the form of brand deals and music deals, has also prompted the raising of all kinds of questions. Questions concerning what AI can and cannot do under the law, and what they should be able to do. Virtual influencers are able to form contracts with brands by promising to participate in some kind of advertisement for payment in return.²⁷ They are also able to form contracts with music labels like many popular artists in the past²⁸. Traditionally, when one does not fulfill a contract, also known as “breaching” the contract, the law provides a remedy. This can become complicated when dealing with virtual influencers, because the brand must know exactly who they are dealing with, otherwise they may have no potential remedy. With the potential loopholes for virtual influencer creators, the legality may be questioned when less sophisticated brands attempt to form contracts. In 2018, influencer Luke Sabbat had legal action brought against him for failing to fulfill a contract with Snapchat.²⁹ His agency was able to sue him because they knew exactly who they were dealing with,³⁰ but with virtual influencers, this may not always be the case.

Without a remedy from the law, can contracts with virtual personalities be valid? Should new laws be put on the books to protect smaller, more inexperienced, brands from virtual personalities? As a law student, I agree that these contracts should be allowed. I believe this because they may force people to make better contracts. The formation of better contracts will require people to learn more about contracts under the law, instead of just going based on what they believe a contract is. As an everyday person, the unpredictability of the rapid advancement of technology is worrisome. The internet already allows people to hide behind a screen, and with virtual personalities, who knows how many may be behind that screen.

After learning a bit about contracts and virtual influencers, I will let you be the judge of what future laws concerning contracting with AI should look like. Within the next decade, who knows, maybe AI will have the same rights as any natural person, like me or you.

²⁶ Bernard Marr, *Virtual Influencer Noonouri Lands Record Deal: Is She The Future Of Music?*, FORBES, (Sept. 5, 2023), <https://www.forbes.com/sites/bernardmarr/2023/09/05/virtual-influencer-noonouri-lands-record-deal-is-she-the-future-of-music/?sh=71bd2347536c>.

²⁷ Jasmine Sheena, *Brands are still figuring out virtual influencers*, Marketing Brew (Sept. 12, 2023), <https://www.marketingbrew.com/stories/2023/09/12/brands-are-still-figuring-out-virtual-influencers.>; Cait Minschy, *How Do Brand Deals with Influencers Work?*, CAIT MINSCHY: LIFESTYLE BLOG, (June 24, 2021), <https://caitminschy.com/how-do-brand-deals-with-influencers-work/>.

²⁸ Bernard Marr, *Virtual Influencer Noonouri Lands Record Deal: Is She The Future Of Music?*, FORBES, (Sept. 5, 2023), <https://www.forbes.com/sites/bernardmarr/2023/09/05/virtual-influencer-noonouri-lands-record-deal-is-she-the-future-of-music/?sh=71bd2347536c>.

²⁹ Dale Barnett, *What Luka Sabbat's breach of contract means for the future of influencer marketing*, INFLUENCER INTELLIGENCE, <https://www.influencerintelligence.com/blog/vh/what-luka-sabbats-breach-of-contract-means-for-the-future-of-influencer-marketing> (last visited Sept. 17, 2023).

³⁰ Dale Barnett, *What Luka Sabbat's breach of contract means for the future of influencer marketing*, INFLUENCER INTELLIGENCE, <https://www.influencerintelligence.com/blog/vh/what-luka-sabbats-breach-of-contract-means-for-the-future-of-influencer-marketing> (last visited Sept. 17, 2023).