




DIGITAL INFLUENCERS AND THEIR CIVIL LIABILITY: AN ANALYSIS OF THE SERVICES AND PRODUCTS ADVERTISED ON THEIR SOCIAL NETWORKS¹

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ABSTRACT

This article aims to investigate the following dynamics: social networks have been a great instrument used by digital influencers to promote the spread of information that can lead followers to suffer moral and material damage. In this sense, it is important to know to what extent influencers can be held responsible. The objective of the analysis of the proposed theme is to understand the civil liability of digital influencers in the exercise of their activity on their social networks for the products and services advertised. From this analysis, we seek to know the historical context and the emergence of influencers; analyze in the light of the legislation the foundations of the civil liability of influencers. In addition, the study intends to understand the concepts of civil liability and its application in the activity of digital influencers. Thus, the work is structured as follows: brief history of digital influencers; how digital influencers came about; concept of civil liability; civil liability of digital influencers and objective and subjective liability.

Keywords: Social networks. Digital influencer. Liability.

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INTRODUCTION

This article seeks to understand how digital influencers can be held responsible for the services and products disclosed on their social networks in the context of their advertising activities. From this analysis, we seek to know the historical context and the emergence of influencers; analyze in the light of the legislation the foundations of the civil liability of influencers. In addition, the study intends to understand the concepts of civil liability and its application in the activity of digital influencers.

For Gasparotto, Freitas & Efig (2019, p. 11), digital influencers, as they share their day-to-day practices, lifestyle, worldview, among other details, are able to gradually gain the trust and credibility of followers, which facilitates the ability to convince users to change their behavior.⁴ In this sense, it is important to reflect on the civil liability of influencers in the event of damage to the follower due to misleading information.

Thus, it is important to emphasize that the work in question is justified by the fact that social networks have been a great instrument used by digital influencers to promote the spread of information that can lead followers to suffer moral and material damage. In this sense, it is important to know to what extent influencers can be held responsible.

The elucidation of the limits applied by the legal system to the subject under analysis will be of great relevance to society in general, as it favors the reduction of the number of lawsuits. Thus, the following problem was used: To what extent can digital influencers be held responsible for the products and services disclosed on their social networks?

In this way, some objectives were built to guide the research, which are: to understand the civil liability of digital influencers in the exercise of their activity on their social networks for the products and services advertised; know the historical context and the emergence of influencers; analyze the foundations of influencers' civil liability in the light of the legislation; understand the concepts of civil liability and their application in the activity of digital influencers.

Thus, for the development of the research in question, the following methodology was used: i) bibliographic review: initially, a bibliographic review on the subject will be made, seeking theoretical and practical references that can support the analysis of the proposed problem. Books, articles, case law, legislation and other relevant documents will be consulted. Definition of research sources: from the literature review, the most relevant

⁴ GASPARATTO, Ana Paula Gilio; FREITAS, Cinthia Obladen de Almendra; EFING, Antônio Carlos. Civil liability of digital influencers. *Legal Journal Cesumar - Master's Degree*, v. 19, n. 1, p.65-87, 9 Apr. 2019. University Center of Maringá. Available at: <http://dx.doi.org/10.17765/2176-9184.2019v19n1p65-87>. Accessed on: April 10, 2025.

research sources for the study will be selected, considering their quality, pertinence and timeliness;

ii) Document analysis: based on the selected sources, a documentary analysis will be carried out to collect relevant information for the development of the article. Documents such as court decisions, laws, regulations, reports, among others taken from the internet on specialized sites such as SCIELO, GOOGLE SCHOLAR, etc. will be considered.

Thus, the method of approach chosen is the so-called deductive, because in our proposal we start from the analysis of doctrines and general laws to understand particular phenomena. To achieve a better result, the research was divided into topics.

BRIEF HISTORY ABOUT DIGITAL INFLUENCERS

It is of paramount importance to know about the origin of digital influencers, because from this knowledge we can understand how this dynamic is structured. Thus, the Infnet institute points out that:

In the past, it was common to see poster boys advertising products from the brands that hired them. Gradually, especially with the emergence of social media, these professionals began to give way to what we now call influencers.⁵

As we can see, the idea of influencer is not new, but dates back a long time ago when companies hired boys to promote their products in an attempt to attract more consumers, this practice would obviously increase earnings enabling greater profitability.

In this sense, it is interesting to note that an influencer does not magically achieve notoriety, being an achievement day after day:

But these new figures did not emerge overnight, because during history there was a whole construction so that such professionals became visible and could use their names to advertise products to the audiences they reached.⁶

Influencers are people who have conquered a certain audience through the trust gained over time, as they share things or practices from their personal life. Thus, by establishing this relationship with their followers, influencers are able to reach a much larger audience by promoting products or services on their social networks.

It is important to note that influencers, despite the large number of followers that some have, due to this power of persuasion, the internet is not a lawless land, the civil

⁵ Instituto infnet. How digital influencers came about. Available at: < <https://blog.infnet.com.br/marketing-influencia/como-surgiram-os-influenciadores-digitais/> > Accessed on: April 07, 2025.

⁶ DITTO

liability of influencers can occur as long as damage to followers is configured by action or omission.

HOW DIGITAL INFLUENCERS CAME ABOUT

It is of great importance to know the emergence of digital influencers to have a sense of their past and understand the current context of this dynamism that innovated communication marketing.

In this sense, the Infnet institute explains that the story of how influencers emerged can be divided into three parts, each in a different historical period.⁷ In this way, we will better understand the three divisions that summarize the emergence of the influencer throughout history.

In the first phase, in 1890, we find the first record of the use of a person's influence when the manufacturer of pancake mix, Aunt Jemima, used the face of a black woman to stamp the packaging of its products.⁸

Initially, at the end of the nineteenth century, there is the first record of the great influence of a single person stamped on the packaging of the products of a certain brand, which, by the way, generated great profits. This was the embryo of what is now called an influencer.

In the second phase, around the 70s, influencer marketing began to be exercised by television.⁹

From that moment on, there was a significant evolution, because with television there was a greater dissemination of products through influential people.

From that time on, poster boys began to gain popularity and stability in the industry, as is the case of Carlos Moreno, who became the face of Bombril. It has even become common for the lines said in the commercials to go viral in the country, where consumers could not even forget the advertised product because of the personality who advertised them.¹⁰

At this historical moment, the industry realized that associating the product with an influential person enabled a strong impact on consumers. In the third phase, the internet

⁷ INFNET INSTITUTE. How digital influencers came about. Available at: < <https://blog.infnet.com.br/marketing-influencia/como-surgiram-os-influenciadores-digitais/> > Accessed on: April 07, 2025.

⁸ DITTO

⁹ DITTO

¹⁰ DITTO

started to be used more frequently. From 2014 onwards, we started to see the market increasingly request the presence of famous personas in the digital world.¹¹

As we have observed, in the third phase, which is characterized by the use of the internet, there was a great evolution of marketing through a social network personality.

CONCEPT OF CIVIL LIABILITY

Civil liability is a legal institute whose function is to punish those who have caused damage to others in an omissive or commissive perspective. In this aspect, it is important to reflect on the reparation of the damage by the plaintiff, the doctrine has already been discussing the subject.

For Caio Mário:

[...] Civil liability consists of the effectiveness of the abstract reparability of the damage in relation to a taxpayer of the legal relationship that is formed. Reparation and taxable person make up the binomial of civil liability, which is then enunciated as the principle that subordinates reparation to its incidence on the person who caused the damage. It does not matter if the basis is guilt, or if it is independent of it. In any circumstance, where there is the subordination of a taxpayer to the determination of a duty of reimbursement, there will be civil liability.¹²

As the doctrinaire above informs, civil liability is based on the effective reparation of the damage caused by the plaintiff who, by intent or fault, caused damage to third parties. In this sense, to the extent that the plaintiff practices an unlawful act that has become damage, the duty to compensate for the losses arises.

Tartuce alleges that:

[...] in addition to being a legal institute, originating from the duty to repair damage, whether patrimonial or off-balance-sheet, resulting from the violation of a legal, legal or contractual duty, civil liability represents a Book of Private Law and of the Brazilian Civil Code itself.¹³

As the present author points out, the institute of civil liability represents an important regulation for social interactions, as it regulates conduct between individuals. This allows for a limit that must be respected by people, since any property or non-patrimonial violation must be duly compensated for the damages sustained by the victim.

Tepedino, on the other hand, teaches that:

[...] In the event of unjust damage, material or moral, the legal system seeks to impute to someone the obligation to repair. If there is no doubt that the victim must

¹¹ INFNET INSTITUTE. How digital influencers came about. Available at: < <https://blog.infnet.com.br/marketing-influencia/como-surgiram-os-influenciadores-digitais/> > Accessed on: April 07, 2025.

¹² PEREIRA, Caio Mário da S. Responsabilidade civil. 13. ed. Rio de Janeiro: Forense, 2022. p. 30

¹³ TARTUCE, Flávio. Liability. 3. ed. Rio de Janeiro: Forense, 2021. p. 70.

be compensated, the same certainty does not exist in relation to the reason why the person who caused the damage is responsible.¹⁴

According to the author's teaching, the legal system points to the imputation that must be made to the author of the damage, that is, he is obliged to make the compensation due to the losses of the taxpayer in the obligation relationship. In this sense, Cavalieri exposes that damage is the great villain of civil liability, it is at the center of the obligation to indemnify. There would be no need to talk about compensation, nor compensation, if it were not for the damage. There can be liability without fault, but there can be no liability without harm.¹⁵

Therefore, the center of civil liability is the damage, Cavalieri teaches that it does not matter if there was intent or fault, if damage occurred, there must be reparation.

CIVIL LIABILITY OF DIGITAL INFLUENCERS

It is of paramount importance to discuss the civil liability of the so-called digital influencers, since this activity has been gaining emphasis on social networks. In this way, we need to understand if the fact that the influencer induces the follower to consume a certain product that has a defect who should be held responsible for the damage, on this reflection Ana Paula Carvalho Salomone, discusses that:

[...] due to the criterion of specialty, as well as the specific protection that the Consumer Protection Code seeks to ensure, treating the vulnerable in a special way, in order to balance consumer legal relations, the analysis of the applicable legislation must start with the consumer code. Thus, if the existence of a consumer relationship between digital influencers and the audience reached by the advertising they broadcast is configured, the rule will be the application of the Consumer Protection Code¹⁶

As the author under analysis well pondered, if the relationship that is established between influencers and their followers is of a consumerist nature, since these users use their social networks to promote products of companies interested in this audience, the application of the consumer protection code is configured to settle any conflicts.

In this sense, the Brazilian code of advertising self-regulation Law No. 4,680, of June 18, 1965, in its article 18 establishes that a consumer is any person affected by the

¹⁴ TEPEDINO, Gustavo; TERRA, Aline de Miranda V.; GUEDES, Gisela Sampaio da C. Fundamentos do direito civil: responsabilidade civil. 3. ed. Rio de Janeiro: Forense, 2022. v. 4. p. 3.

¹⁵ CAVALIERI FILHO, Sergio. Civil liability program. 15. ed. Barueri: Atlas, 2021. p. 47

¹⁶ SALOMONE, Ana Paula Carvalho. *The civil liability of digital influencers for illicit advertising*. Dissertation (Master's Degree in Law) – Faculty of the Superior Foundation of the Public Prosecutor's Office, Porto Alegre, 2020. Available at: <https://fmp.edu.br/publicacoes/a-responsabilidade-civil- of digital-influencers-for-illicit-advertising/>. Accessed on: April 08, 2025.

advertisement, whether as a final consumer, intermediate audience or user.¹⁷ The influencer activity on social networks is driven by ads, so the consumerist relationship is configured.

Digital influencers, when using the available social networks to carry out propaganda due to their influence, must ensure the precepts that govern advertising, in this aspect Ana Paula Carvalho Salomone, points out that:

[...] Considering the professional and commercial nature of the activity of digital influencers, as well as the evident vulnerability of their followers in the face of illegal advertising by them, it is possible to recognize them as members of the advertising dissemination chain, and are, therefore, jointly and severally liable for damages arising from the placement of advertisements that fail to comply with advertising regulations. The precepts arising from the advertising regulation must be observed by all those who work in this activity, considering the advertiser, the advertising agency, the advertising vehicle, the advertiser, the journalist and any other communication professional involved in the advertising process.¹⁸

As can be inferred from the author's analysis in question, the activity carried out by the so-called influencers, since they are part of the advertising dissemination chain, they can be held responsible for any damages caused through advertisements to their followers. In this line, we can say that influencers when propagating an ad of an illicit nature may be jointly and severally liable.

The civil liability of digital influencers increases as they can reach numerous followers, and obviously, any misleading information can affect countless people, at this point Bruno Gallucci, establishes that:

[...] This type of advertising triggers a behavior in the consumer, at a conscious and unconscious level, generating an immediate response due to the pre-existing concept that one has of that person or group that is testifying in favor of the product, adding values such as admiration, success, wealth, beauty, youth, joy, internationality, tradition, notoriety, etc.¹⁹

Influencers are able to exercise great credibility and admiration for their followers, which enhances the extension of the ads, reaching a significant number of people. As a result, digital influencers must be careful and zealous with the content posted.

¹⁷ BRAZIL. Brazilian Code of Advertising Self-Regulation. Available at: < <https://www.gov.br/secom/pt-br/acao-a-informacao/legislacao/ca2digobrasdeautoregulanovo>. > accessed on: April 08, 2025

¹⁸ SALOMONE, Ana Paula Carvalho. *The civil liability of digital influencers for illicit advertising*. Dissertation (Master's Degree in Law) – Faculty of the Superior Foundation of the Public Prosecutor's Office, Porto Alegre, 2020. Available at: <https://fmp.edu.br/publicacoes/a-responsabilidade-civil- of digital-influencers-for-illicit-advertising/>. Accessed on: April 08, 2025

¹⁹ GALLUCCI, Bruno. The civil liability of digital influencers. *Conjur*, 2021. Available at: <https://www.conjur.com.br/2021-set-23/gallucci-responsabilidade-civil-influenciadores-digitais>. Accessed on: April 08, 2025

OBJECTIVE AND SUBJECTIVE LIABILITY

Law No. 8,078/1990, known as the Consumer Protection and Defense Code, establishes several mechanisms that have as their intention the effective support and protection of the consumer. Thus, in article 12 strict liability is instituted, that is, the agent responds regardless of fault, let's see:

The manufacturer, the producer, the builder, national or foreign, and the importer are liable, regardless of the existence of fault, for the repair of damages caused to consumers by defects arising from the design, manufacture, construction, assembly, formulas, handling, presentation or packaging of their products, as well as for insufficient or inadequate information about their use and risks.²⁰

As we can see, strict liability is clear in the sense that in the consumer relationship, the supplier (art., 14), manufacturer, producer or equivalent are liable for the damages caused to consumers regardless of the existence of fault, that is, for the fact of offering the products in the market, the supplier or equivalent party assumes full responsibility for the losses. That way, if the product has any problem, the responsible party must make the necessary repair.

On the other hand, subjective liability is typified in article 14, paragraph 4 of the CDC, when it deals with the liability of liberal professionals where the existence of fault must be verified. Thus, it is necessary to prove guilt for the purposes of civil liability of liberal professionals.

Civil liability is a legal institute that aims to protect consumers, as they are more vulnerable with regard to the evidentiary aspect. In this context, when damage occurs in the consumer relationship, there must be effective reparation even if this fact occurs in the context of the internet, Tartuce and Neves, argue that:

In fact, the CDC expressly adopted the idea of the theory of profit risk, which generates liability without fault precisely because it brings benefits or advantages. In other words, the one who exposes other people, determined or not, to risks by deriving a benefit from it, direct or not, must bear the consequences of the aggravating situation. One of these consequences is precisely the strict and joint liability of the agents involved with the provision or supply.²¹

Digital influencers can respond for the ads published on their social networks if an action or omission is found that results in damage or losses to their followers.

The majority and jurisprudential doctrine understands that the responsibility of the digital influencer is objective, that is, his fault or intent is not analyzed. With this, it is

²⁰ BRAZIL. Consumer Protection and Defense Code. Available at: <https://www.planalto.gov.br/ccivil_03/leis/l8078compilado.htm > accessed on: April 08, 2025.

²¹ TARTUCE, Flávio; NEVES, Daniel Amorim Assumpção. Manual de Direito do Consumidor: Direito Material e Procedual. 5. ed. São Paulo: Forense, 2015. (Revised, updated and expanded).

important that digital influencers seek to analyze information about companies before advertising their products or services.²²

As we can see, the civil liability of digital influencers is objective, according to the majority understanding of case law, in this case, when a certain influencer disseminates ads of a misleading and illicit nature, he may be held liable for the damages sustained by the victim/follower.

It is important to say that when it comes to strict civil liability, it is not verified whether the agent acted with intent or fault, it is enough that damage and the causal link occur for the obligation of reparation to be configured.

Let's look at a decision by the STJ:

Resp 1.840.239/SP: the Superior Court of Justice (STJ) decided that digital influencers can be held liable for damages caused to consumers as a result of misleading advertising, regardless of their intention or prior knowledge of the false information disclosed.²³

The Superior Court of Justice consolidated the understanding that the liability of digital influencers is objective, that is, regardless of the existence of fault. This decision of the special appeal emanating from the STJ is of great importance to protect followers/consumers who are induced by the influencer who, obviously, are financed by companies.

The Court of Appeals of the State of São Paulo, in a recent decision, established the understanding in the following sense:

The 30th Chamber of Private Law of the Court of Justice of São Paulo sentenced a consulting company and digital influencer to indemnify a follower, for moral damages, after misleading advertising of an online course. The value of the reparation was set at R\$ 5 thousand. In the 1st degree, the 10th Civil Court of the Regional Forum of Santo Amaro had already determined the reimbursement of R\$ 829, as material damages, and declared the nullity of the contract signed between the parties.²⁴

As we can see from the case under analysis that the influencer in question was sentenced to pay moral damages due to misleading advertising about an online course, this decision of the Court of Justice of the State of São Paulo configures an important evolution in the sense of support and protection for followers/consumers.

²² JUSBRASIL. Available at: < <https://www.jusbrasil.com.br/artigos/a-responsabilidade-do-influenciador-Digital> > accessed on: April 08, 2025.

²³ JUSBRASIL. Available at: < <https://www.jusbrasil.com.br/artigos/a-responsabilidade-do-digital-influencer> > accessed on: April 08, 2025.

²⁴ Court of Justice of the State of São Paulo. Available at: < <https://www.tjsp.jus.br/Noticias/Noticia?codigoNoticia=96153> > Accessed on: April 08, 2025.

The so-called influencers in the exercise of their activities on social networks, as can be seen, should be held responsible for the practice of misleading advertising in the civil sphere, repairing the damages suffered by those followed.

The civil liability of digital influencers must be pleaded in the judiciary, since the influencer, when advertising on his social networks, propagates misleading ads and misleads followers, there is nothing fairer than compensating for all losses.

In a recent decision, the Superior Court of Justice has taken a position in the sense that digital influencers, as well as any other service provider, can be held liable for damages caused to consumers as a result of the activity developed.²⁵

This understanding of the STJ is of great expression, because in fact influencers are actually equated to service providers who must be held responsible for the acts they practice.

Thus, it is important to say that in addition to compensation for moral damages to which influencers are subject, they can also be liable for material damages, in this aspect the STJ understands that:

The STJ has already decided in some cases that influencers can be held liable for moral and material damages caused to consumers. For example, if an influencer disseminates false or misleading information about a product, or even promotes a financial pyramid and a consumer is financially harmed as a result of this practice, the influencer can be held liable for the damages caused.²⁶

It is important to emphasize that no matter the means used, if someone disseminates false news that causes losses and damages to third parties, the author must obligatorily repair the moral and material damages. The fact that influencers use social networks to promote false information cannot exempt them from civil liability.

FINAL CONSIDERATIONS

Nowadays, people are increasingly connected due to the spread of social networks, the fact of being connected to a social network has become a reality, so that hiring a wi-fi service has been incorporated into people's daily lives as if it were a water bill that we pay every month. In today's world, being connected is a necessity.

Due to these changes, it is not difficult to come across the so-called influencers on social networks, who over time have been gaining space and credibility with their followers. It is notorious how these users manage, in the exercise of their activities, to gradually gain

²⁵ JUSBRASIL. Available at: < <https://www.jusbrasil.com.br/artigos/a-responsabilidade-do-digital-influencer/> accessed on: April 09, 2025.

²⁶ DITTO

the trust of users or followers who let themselves be carried away by the posts of messages and videos on the social networks of these influencers.

It is of paramount importance to reflect on the civil liability of digital influencers in the face of their advertising activities on their social networks, since they must answer for the acts they practice if there is a materialization of moral or material damages. In this way, when posting a misleading ad that induces followers or consumers to suffer damages, these people have the right to reparation.

Thus, it is important to say that the consolidated understanding of the doctrine and jurisprudence is in the sense that the civil liability of digital influencers is objective. This means that it doesn't matter if the influencer had intent or fault for the losses suffered by followers. In this sense, in the face of damages, the influencer has a legal obligation to compensate for the losses.

The Brazilian code of advertising self-regulation Law No. 4,680, of June 18, 1965, which also regulates consumer relations alongside the CDC, in its article 18 establishes that a consumer is any person affected by the advertisement, whether as a final consumer, intermediary audience or user. The influencer activity on social networks is driven by ads, so the consumerist relationship is configured.

Digital influencers are normal people and subject to error, given this possibility, it is worth noting the need to handle their social networks in light of the legislation in force with regard to advertising standards. Therefore, if the influencer acts with caution and vigilance, the probability of responding in court decreases significantly.

Finally, digital influencers, given the scope of their reach and the speed by which they conquer their followers, need to follow the guidelines of the legal system, especially the legislation that deals with consumer relations and advertising to avoid or reduce lawsuits.

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