

“BUT MY FAVORITE INFLUENCER TOLD ME TO”: HOW AND WHEN TO ASSIGN LIABILITY TO INFLUENCERS WHEN THEIR FOLLOWERS COMMIT TORTS

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Abstract

When I was in middle school, I got in trouble for imitating a YouTube video. When my mom asked where I saw that, I replied “a YouTuber.” I faced consequences; the YouTuber, rightfully did not. Fifteen years later, 63.7% of the global population uses social media. Millions of those users are considered “influencers.” Influencers are social media users with extensive online followings. Often specializing in a niche industry—fitness, beauty, video games, political or social commentary, entertainment, and more— influencers attract massive audiences who are literally influenced by their online activity. The influence of influencers can be seen in the “non-digital” world; followers purchase influencer-promoted products, imitate influencers’ personalities, and reenact what they see online. When an influencer’s actions influence a follower to commit a tort, should the influencer be liable? Drawing from employment law, intellectual property, and promotional and product liability, an Influencer Liability Framework would hold influencers liable for their followers’ torts while respecting tenets of fairness, reasonableness, and foreseeability.

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I. INTRODUCTION

On August 4, 2023, Kai Cenat, a social media influencer with over 10 million subscribers across YouTube, Instagram, and Twitch, held a major giveaway for his fans in Union Square Park, New York.¹ Fans attended the giveaway in hopes of receiving computers, PlayStations, and gift cards.² Cenat promoted the event telling his viewers, “all the trains go here so there’s no excuse.”³ After considering the number of possible attendees, Cenat asked his

1. Zoe Sottile & Mark Morales, *Twitch Streamer Charged with Inciting a Riot after Giveaway Draws Huge Crowds to Union Square in New York City*, CNN (Aug. 6, 2023, 9:22 PM), <https://www.cnn.com/2023/08/04/us/kai-cenat-union-square-nyc-crowds/index.html> [https://perma.cc/5RYC-3FRE].

2. *Id.*

3. Chelsia Rose Marcius & Maria Cramer, *How New York Lost and Regained Control of Union Square*, N.Y. TIMES (Aug. 8, 2023), <https://www.nytimes.com/2023/08/08/nyregion/kai-cenat-union-square-nyc-riot.html> [https://perma.cc/DSN9-PLA7].

friend to inquire about security measures.⁴ Despite Cenat's altruistic motives, the giveaway "descended into mayhem" when several thousand young people began to riot at the park.⁵ After roughly three hours, the New York Police Department had arrested 65 individuals—nearly half were juveniles.⁶ During the riot, the crowd invaded and vandalized a construction site, threw rocks and bottles, set off fireworks, jumped on cars, and committed several acts of violence against the police and the public.⁷

After the chaos had settled, Cenat was charged with first-degree rioting, inciting a riot, and unlawful assembly.⁸ In a post after the riot, Cenat acknowledged the immense power and influence he has on his viewers.⁹ Security and public safety consultants say the blame lies partly with Cenat, who failed to take proper safety precautions.¹⁰ In addition to possible criminal convictions, Cenat may be civilly liable for failing to get a permit, causing property damage, or even physical damage.¹¹

This note aims to answer the question of when social media influencers can be held liable for their viewers' tortious actions. Part II discusses the background of influencers, the real-life consequences of their actions, and their unique legal treatment. Part III evaluates how the current law fails to address the niche and novel issue of influencer liability and what elements of current vicarious liability theories can be applied to influencers. Part IV recommends an Influencer Liability Framework to hold influencers liable for harms caused by their followers when the influencer (1) made an affirmative action or took affirmative steps to encourage an act that (2) created an unreasonable risk, and the follower (1) was motivated to serve the interests of the influencer and (2) caused harm that was foreseeable due to the unreasonable risk created.

4. *Id.*

5. Sottile & Morales, *supra* note 1.

6. *Id.*

7. *Id.*

8. Orlando Mayorquin & Eduardo Medina, *What We Know About the Chaos Caused by a Twitch Star's Giveaway*, N.Y. TIMES (Aug. 5, 2023), <https://www.nytimes.com/2023/08/05/nyregion/kai-cenat-union-square-riot.html> [<https://perma.cc/AUH9-6JJ9>].

9. *16 Sought in Union Square Riot for Damaging Car During Kai Cenat Event*, ABC 7 NEWS (Aug. 15, 2023), <https://abc7ny.com/kai-cenat-twitch-union-square-park-car-damaged/13651837/> [<https://perma.cc/C8PW-4TXA>].

10. Marcus & Cramer, *supra* note 3.

11. Jonathan Turley, *What Kai Cenat and Donald Trump Have in Common*, N.Y. POST (Aug. 6, 2023, 4:08 PM), <https://nypost.com/2023/08/06/what-kai-cenat-and-donald-trump-have-in-common/> [<https://perma.cc/2645-FXRB>].

II. BACKGROUND

In last two decades, social media use has risen exponentially.¹² With social media use has come the rise of influencers.¹³ Influencers often garner massive fan bases, and their words and actions *influence* those loyal fans.¹⁴

A. *The Rise of Influencers*

In 2004, MySpace became the first industry and media platform to reach one million active users per month.¹⁵ Two decades later, 63.7% of the global population uses social media.¹⁶ With social media use has come a new type of person—influencers.¹⁷ Influencers come in many forms—bloggers, online personalities, and everyday celebrities.¹⁸ They are “people with extensive social media followings who share content on Instagram, TikTok, Twitter, Facebook, and other social media applications.”¹⁹ Most specialize in a niche industry and share content to build their online community.²⁰

The *influence* of influencers has real world consequences.²¹ To achieve a sense of belonging, teens mimic influencers.²² For example, among young boys, an increase in exposure to misogynistic influencer content led to an increase of sexist language in schools.²³ Idealized body images and high beauty standards of influencers change the perception of what constitutes beauty and has had

12. Esteban Ortiz-Ospina, *The Rise of Social Media*, OUR WORLD IN DATA (Sept. 18, 2019), <https://ourworldindata.org/rise-of-social-media> [https://perma.cc/F3N5-SFQZ].

13. Kat Shee, *The Rise of Influencers in Media*, FORBES (June 23, 2023, 7:30 AM), <https://www.forbes.com/sites/theyec/2023/06/23/the-rise-of-influencers-in-media/?sh=49b39572695f> [https://perma.cc/TJ23-7CKG].

14. See *Psychology of Influence—The Reason for the Rise of Influencer Marketing*, GRIN, <https://grin.co/blog/psychology-of-influence/> [https://perma.cc/M7UU-VQ42] (last updated July 2023) (detailing the psychology behind trust in influencers, and how they impact the decision making of their fans).

15. Ortiz-Ospina, *supra* note 12.

16. *Global Social Media Statistics*, DATAREPORTAL, <https://datareportal.com/social-media-users> [https://perma.cc/M9WZ-EUUN] (last visited Oct. 1, 2024).

17. See Stasia Skalbania, *Advising 101 For the Growing Field of Social Media Influencers*, 97 U. WASH. L. REV. 667, 669 (2022) (“Social media influencers are a relatively new phenomenon, but they have had an incredible impact on marketing strategies, consumer protection law, and society generally.”).

18. *How to Select a Social Media Influencer for Your Campaign*, THOMSON REUTERS, <https://legal.thomsonreuters.com/en/insights/articles/how-to-select-social-media-influencer> [https://perma.cc/5CKX-4WDV] (last visited Oct. 1, 2024).

19. Skalbania, *supra* note 17.

20. *Id.*

21. See *Impact and Influence: The Effects of Influencer Culture on Society*, IZEA, (Apr. 2, 2024) <https://izea.com/resources/impact-and-influence-of-influencer-culture-on-society/> [https://perma.cc/3A4B-3J6D] (discussing the reach of social media and influencers); Richard Dancsi, *Do Influencers Really Influence Us?*, PSYCH. TODAY (Mar. 7, 2022), <https://www.psychologytoday.com/intl/blog/dear-life-please-improve/202203/do-influencers-really-influence-us> [https://perma.cc/HS4R-SLEN].

22. Karima Lajnef, *The Effect of Social Media Influencers' on Teenagers Behavior: An Empirical Study Using Cognitive Map Technique*, 42 CURRENT PSYCH. 19364, 19372 (2023).

23. See Louisa Clarence-Smith, *Sexist Language Increasing in Schools as More Boys Are Exposed to Misogyny Online*, TELEGRAPH (Feb. 6, 2024, 7:00 AM), <https://www.telegraph.co.uk/news/2024/02/06/sexist-language-increasing-schools-boys-misogyny-online/> [https://perma.cc/EUL2-4D5S] (“70 per cent of teachers have seen a rise in sexist language in the classroom over the last year, while 69 per cent of boys have encountered posts promoting misogyny. . . . 42 per cent of parents had heard their sons make inappropriate comments because of what they had seen online, including comments that were sexual, violent or degrading about women and girls.”).

detrimental effects on the mental health of young women.²⁴ The influence does not stop at appearance because influencers often promote particular lifestyles and activities.²⁵ “Millennials and the following generations have been exposed to the rapid modernization of technology, leaving them susceptible to trusting social media influencers. As a result, millennials and minors under the age of eighteen are easily drawn to products that influencers review.”²⁶

B. *Special Treatment of Influencers*

Following the rise in social media, courts, administrative agencies, and legal scholars have addressed the concept of social media influencers in the context of marketing, their relationship to social media platforms, and their unique responsibilities and standing.²⁷

The “influence” of social media influencers is frequently seen in marketing.²⁸ In general, social media influencers are individuals who use social media platforms and whose knowledge, authority, position, or relationship has the power to affect followers’ purchasing decisions.²⁹ A common issue is what

24. Iksha Jaiswal et al., *Social Media Influencers’ Impact on Young Women’s Acceptance of Beauty Standards*, 10 INT’L J. RSCH. & ANALYTICAL REVS 597, 599 (2023).

25. *Id.*

26. Krystina Dorta, *No Ifs, Ands, or Juuls About It: Why Influencers Must be Held Accountable*, 29 CATH. U. J. L. & TECH. 131, 142 (2021).

27. See Bianca Ascolese, *Regulating Influencer Marketing: A Comparative Analysis of Laws Across the World*, FOLEY & LARDNER (Sept. 13, 2023), <https://www.foley.com/insights/publications/2023/09/regulating-influencer-marketing-analysis-laws/> [<https://perma.cc/QC34-ADC4>] (“Governments around the world have recognized the importance of regulating influencer activities to safeguard consumers and ensure transparency of promotional activities.”); *Social Media Influencer Marketing & Related Legal Issues*, JUSTIA, <https://www.justia.com/business-operations/legal-issues-for-social-media-influencer-marketing/> [<https://perma.cc/5DCW-7WJD>] (last visited Oct. 1, 2024).

28. See Megan K. Bannigan & Beth Shane, *Towards Truth in Influencing: Risks and Rewards of Disclosing Influencer Marketing in the Fashion Industry*, 64 N.Y.L. SCH. L. REV., 247, 249 (2019–2020) (discussing the “effectiveness” and “radiating success” of social media advertising campaigns sponsored by influencers).

29. See Lauryn Harris, *Too Little, Too Late: FTC Guidelines on “Deceptive and Misleading” Endorsements by Social Media Influencers*, 62 HOWARD L.J. 947, 955 (2019) (“Influencers, in general, are defined as ‘individuals who have the power to affect purchase decisions of others because of their (real or perceived) authority, knowledge, position, or relationship,’ and they leverage their popularity on social media platforms to endorse third-party products.”); see also Skalbania, *supra* note 17 (defining social media influencer as “people with extensive social media followings who share content on [social media platforms]” and stating “all influencers have the power to affect the purchasing decisions based on the influencer’s knowledge, authority, position or relationship to their audience.”); see also Mark Goodrich & Jason Howell, *Influencers: What Every Brand and Legal Counsel Should Know*, 36 GPSOLO, Sept.–Oct. 2019, at 60 (“An ‘influencer’ is any person with credibility who can influence the opinions or purchase decisions of others.”); see also, Abigail Dagher, *The Influencers and the Influenced: Effects of Social Media Influencers on Enforcement of Trademark Law in the U.S. and Europe*, 37 EMORY INT’L L. REV. 741, 744 (2023) (defining social media influencers as “independent third-party endorsers who shape audience attitudes through their social media activity, facilitating connectedness and highlighting recommendations.”); see also Nicholas Robinson & Jaclyn Shan, *Taxing the Legitimate Business of Social Media Marketing in the Age of Influence*, 22 TEX. REV. ENT. & SPORTS L. 1, 4 (2021) (defining social media influencer as one with “the power to affect the purchasing decision of others because of his or her authority, knowledge, position, or relationship with his or her audience” and “a following in a distinct niche, with whom he or she actively engages.”).

responsibilities influencers have when engaging in paid advertisements where they are paid to promote a product or service on their social media page(s).³⁰

In *Colgate v. Juul Labs*, the court defined social media influencers as “‘high-social net worth’ individuals who have developed large social media followings.”³¹ People follow influencers because they are known to be trend-setters and tend to post high quality, interesting photos and content.³² “Companies pay influencers to ... post about their products in a similar fashion to ‘product placement’ in traditional media.”³³ “The modern practice of using social media ‘influencers’ to market products has caught the FTC’s attention in recent years.”³⁴ Individuals with large social media followings are frequently selected to represent a product or brand.³⁵ The practice of influencer marketing led to the FTC’s release of “Disclosures 101 for Social Media Influencers.”³⁶ In an effort to “stop deceptive ads,” the FTC suggests social media endorsements “make it obvious when you have a relationship (‘material connection’) with the brand.”³⁷ The FTC addresses influencers directly stating, “[a]s an influencer, it is **your responsibility** to make these disclosures and to be familiar with the Endorsement Guides, and to comply with laws against deceptive ads.”³⁸ Notably, the FTC prohibits influencers from engaging in specific acts: (1) “You can’t talk about your experience with a product you haven’t tried,” (2) “If you’re paid to talk about a product and thought it was terrible, you can’t say it’s terrific,” and (3) “You can’t make up claims about a product that would require proof the advertiser doesn’t have—such as scientific proof that a product can treat a health condition.”³⁹ The influencer’s disclosure allows followers to “weigh the value of [influencer] endorsements.”⁴⁰ Influencers who fail to disclose their relationship with promoted brands are liable for violations of unfair trade

30. *Ethical Marketing: Responsible Collaborations with Influencers*, KOLSQUARE (June 6, 2023), <https://www.kolsquare.com/en/blog/ethical-marketing-responsible-collaborations-with-influencers> [<https://perma.cc/J6QM-93HB>] (discussing that Influencers are paid when companies reach out and ask them to promote their products in videos or posts).

31. *Colgate v. Juul Labs, Inc.*, 402 F. Supp. 3d 728, 742 (N.D. Cal. 2019).

32. *Id.*

33. *Id.* See also *Jianming Jyu v. Ruhnn Holdings Ltd.*, 2020 N.Y. Misc. LEXIS 2250, 1 n. 1 (Sup. Ct.) (defining “social media influencers” as “individuals who create content on social media platforms such as Facebook, YouTube, TikTok, and Instagram with the hopes of garnering a large public following.”); see also *Ariix, LLC v. NutriSearch Corp.*, 985 F.3d 1107, 1116 (9th Cir. 2021) (“[C]ompanies now pay so-called ‘influencers’ to issue posts on social media touting their products or services.”); see also *Chihaiia v. Go Giveaways*, 2022 Fla. Cir. Lexis 4843, *2 (“[Social media] [u]sers with large number of followers who regularly generate content in their respective profile/account can be perceived to influence consumer behavior (‘influencers’).”).

34. 7 EARL W. KINTNER ET AL., FEDERAL ANTITRUST LAW § 52.11 (2023).

35. *Id.*

36. *Disclosures 101 for Social Media Influencers*, FTC 1, 2 (Nov. 2019), https://www.ftc.gov/system/files/documents/plain-language/1001a-influencer-guide-508_1.pdf [<https://perma.cc/FK3S-3U8P>].

37. *Id.*

38. *Id.*

39. *Id.* at 6.

40. *Id.* at 2.

practices.⁴¹ In *Sava v. 21st Century Spirits, LLC*, defendant-influencers failed to disclose they were paid to promote Blue Ice products.⁴² Plaintiff-followers alleged “they took the Influencers to be offering ‘honest advice’ about Blue Ice and ‘would not have purchased [Blue Ice] products if they knew that the Influencers were paid’ to promote it.”⁴³ The *Sava* court concluded “the paid relationship between 21st Century and the Influencers should have been disclosed by the Influencers,” and failure to disclose was plausibly a “deceptive act.”⁴⁴ Additionally, Plaintiff-followers, must identify specific defendant-influencer posts containing undisclosed ads that caused them to purchase the advertised product or service.⁴⁵

In addition to their marketing responsibilities, social media influencers have unique standing in courts.⁴⁶ In *L-Nutra, Inc. v. Prevail Sols., LLC*, the court found that the defendant merely working with a California social media influencer to promote its products did not establish sufficient grounds for personal jurisdiction in California, especially when the influencer’s content did not specifically target a California audience.⁴⁷ In *Zuckerbrot v. Lande*, a social media influencer published “over 4,500 Instagram posts assailing plaintiffs.”⁴⁸ Here, the court defined an influencer as “a social media personality who shares his or her daily life online with their followers.”⁴⁹ Following plaintiff’s defamation suit, the defendant-influencer claimed immunity under the Communications Decency Act, which was denied because the influencer was held to be a “content provider” and not a “service provider.”⁵⁰ *Zuckerbrot* demonstrates the line between social media platforms and social media influencers because the defendant-influencer was sharing posts and reviews originally published by third parties.⁵¹ While social media platforms act as a “passive conduit for messages of third parties,” influencers “actively ‘create or develop . . . information provided through the internet.’”⁵² *Zuckerbrot* also

41. See *Sava v. 21st Century Spirits, LLC*, No. 22 C 6083, 2024 U.S. Dist. Lexis 111496, at *27–42 (N.D. Ill. June 25, 2024) (concluding that plaintiffs’ allegations regarding defendant-influencers’ misrepresentations were sufficiently particular to state claims for deceptive and unfair practices); see also *In re Ethereummax Inv’r Litig.*, CV 22-00163-MWF, 2023 U.S. Dist. Lexis 186489, at *103–04 (C.D. Cal. 2023) (“[G]iven [defendant-influencer] did not disclose that he was paid [to Tweet about EMAX products] . . . it is plausible that reasonable consumers could find it material that he had ‘made more money’ with EMAX.”).

42. *Sava*, 2024 U.S. Dist. Lexis 111496 at *59–60.

43. *Id.* at *59.

44. *Id.* at *60.

45. See *Pop v. Lulifama.com LLC*, No. 8:22-cv-2698, 2023 U.S. Dist. Lexis 125429, at *8 (M.D. Fla. July 20, 2023) (“[Plaintiff] has not indicated which posts from the Influencer Defendants led him to purchase the [advertised] product.”).

46. Dennis Siaw-Lathey, *Navigating the World of Influencer Advertising: Key Legal Considerations*, A.B.A.: BUS. L. TODAY (May 15, 2023), https://www.americanbar.org/groups/business_law/resources/business-law-today/2023-may/navigating-the-world-of-influencer-advertising-key-legal-considerations/ [<https://perma.cc/AX32-LPAG>].

47. *L-Nutra, Inc. v. Prevail Sols., LLC*, No. 2:21-cv-04564, 2021 U.S. Dist. Lexis 197599, at *10 (C.D. Cal. Oct. 12, 2021).

48. *Zuckerbrot v. Lande*, 75 Misc. 3d 269, 272 (N.Y. Sup. Ct. 2022).

49. *Id.* at 273–74.

50. *Id.* at 287.

51. *Id.* at 286–87.

52. *Id.* at 287 (quoting 47 U.S.C. § 230(c)).

suggests that courts are open to assigning liability to influencers for their posts when they have negative outcomes on plaintiffs.⁵³

C. *The Rise of Streaming*

In today's increasingly online world, being an influencer has become a popular career for many, with over 4.5 million professional influencers in the United States and over 10 million worldwide.⁵⁴ A subset of influencing is streaming, and there were 9 billion total live-streaming hours watched in the last quarter of 2021.⁵⁵ Live streaming differs from traditional television or prerecorded media because of the inherent features of being live—uncut, unedited, uncensored.⁵⁶ Popular live streaming apps include Facebook, Instagram, Twitch, and TikTok.⁵⁷ Twitch is the most popular live streaming platform with 6.51 billion of the total 9 billion hours watched.⁵⁸ These streaming apps enable influencers to host public live streams to be watched by potentially thousands of people—often children who enjoy connecting with their favorite streamers who share their interests.⁵⁹

Part of the uniqueness of live streaming is not only in its media, but also in its viewership.⁶⁰ 70 percent of Twitch viewers are age 16 to 34, and 62 percent of Americans over 55 never watch live streamed video.⁶¹

Watching live streams presents many concerns for children viewing them.⁶² Children may be exposed to non-age-appropriate content, including sexual or violent content.⁶³ Children may be exposed to inappropriate comments left on feeds.⁶⁴ Also, the idea of something being live may be exciting for young viewers who then act on impulse.⁶⁵

53. *See id.* at 272 (“[Plaintiffs] allege [their] monthly sales revenue has dropped from approximately \$1 million per month to less than \$90,000 per month, specifically as a result of [defendant’s] social media activity.”).

54. Andrii, *How Many Influencers are There in 2023*, TREND HERO (June 6, 2023), <https://trendhero.io/blog/how-many-influencers-are-there/#:~:text=There%20are%20more%20than%2064,and%20trends%20cannot%20be%20overstated> [<https://perma.cc/B3XA-KLR7>].

55. Nicola Bleu, *47 Latest Live Streaming Statistics for 2024: The Definitive List*, BLOGGING WIZARD (July 13, 2023), <https://bloggingwizard.com/live-streaming-statistics> [<https://perma.cc/Q2KQ-7T2Y>].

56. *A Guide to Live Streaming*, CEOP, <https://www.thinkuknow.co.uk/parents/articles/what-is-live-streaming/> [<https://perma.cc/4NTA-VHY5>] (last visited Mar. 8, 2024).

57. *See* Jordan Minor, *Twitch and Beyond: The Best Video Game Live Streaming Services for 2024*, PCMAG, <https://www.pcmag.com/picks/best-video-game-live-streaming-services> [<https://perma.cc/MNT3-9NAP>] (last updated Dec. 22, 2022) (recommending livestreaming sites for video games).

58. Bleu, *supra* note 55.

59. *See id.* (citing 70% of Twitch demographics as between 16–34 years of age).

60. Bleu, *supra* note 55.

61. *Id.*

62. Pratt, *infra* note 63.

63. *See* Joseph Pratt, *Is Twitch Safe for Kids?*, GABB (Dec. 15, 2023), <https://gabb.com/blog/is-twitch-safe-for-kids/#gabb-reference-1> [<https://perma.cc/U336-HNSM>] (explaining how young users can watch highly graphic video games with no restrictions and are exposed to mature content via popular categories like “ASMR” and “Pools, Hot Tubs, and Beaches.”).

64. *Id.*

65. *Id.*

D. *In Real Life Consequences of Influencers and Streaming*

The advent of live streaming and influencer popularity has not come without consequences in real life (“IRL”).⁶⁶ The following subsections will address common acts committed by followers and viewers: Doxing, swatting, and the devious licks trend.⁶⁷

1. *Doxing*

“Doxing, short for ‘dropping documents,’ is the practice of disclosing a person’s identifying information (e.g., their home address) on the Internet to retaliate against and harass the ‘outed’ person.”⁶⁸ Unfortunately, doxing is typically not illegal.⁶⁹ Additionally, “[j]urisdictional issues, First Amendment concerns, and Section 230 of the Communications Decency Act present huge barriers to effective regulation [of doxing].”⁷⁰ It is not unusual for fervent fan bases to retaliate against those who they view to have wronged their celebrity idol once the commentator is doxed.⁷¹ Popular Twitch Streamer Nadia commands an audience of 1.2 million followers.⁷² In December 2022, Nadia retaliated against a “troll” donation by revealing the donor’s PayPal information with their full name.⁷³ Nadia was initially banned because her actions violated Twitch guidelines, but she was unbanned within hours.⁷⁴

Spekel, another popular Twitch Streamer doxed a viewer in April 2019, releasing their full name and email address.⁷⁵ Spekel, while showing the donor’s information, addressed her viewers saying, “here’s his full name and this is his email address. If you guys want to—fuck him.”⁷⁶

66. See Turley, *supra* note 11 (providing an example of an influencer disturbing public peace).

67. *Infra* notes 68, 101; Wash. Rev. Code Ann. § 9A.84.040 (West 2024).

68. Vangheluwe v. Got News, LLC, 365 F. Supp. 3d 850, 852 (E.D. Mi. 2019).

69. See Hannah C. Mery, *The Dangers of Doxing and Swatting: Why Texas Should Criminalize These Malicious Forms of Cyberharassment*, 52 ST. MARY’S L.J. 905, 915 (2021) (“[B]ills introduced in the United States House and Senate proposing federal regulations for doxing, swatting, and law enforcement training regarding cybercrimes have slim chance of being enacted or have died altogether.”).

70. Hannah Shankman, *How to Close a Pandora’s Dox: A Case for the Federal Regulation of Doxing*, 33 UNIV. FLA. J. L. TECH. & POL. 273, 273 (2023).

71. See Chris Panella, *Taylor Swift Fans Sent Me Death Threats, Doxed my Family, and Accused Me of Being a Pedophile after I Criticized her Eras Tour*, BUS. INSIDER (June 22, 2023), <https://www.businessinsider.com/harassment-taylor-swift-fan-base-worse-than-far-right-hate-2023-6> [<https://perma.cc/8LFW-YWT2>] (recalling how a reporter, after criticizing Taylor Swift’s tour was sent messages Doxing his personal information, threatening his life, calling him slurs, and lodging threats against his loved ones and friends).

72. Nadia, TWITCH, <https://www.twitch.tv/nadia> [<https://perma.cc/XM45-AY2X>] (last visited Oct. 12, 2023).

73. Jake Selway, *Twitch Streamer Nadia’s Doxing Ban Controversy Explained*, GAME RANT (Dec. 18, 2022), <https://gamerant.com/twitch-streamer-nadia-doxing-ban-length-controversy-drama-explained/> [<https://perma.cc/4FS4-GRSC>].

74. *Id.*

75. Matt Porter, *Twitch Streamer Doxxes Viewer After Misunderstanding Donation as a Death Threat*, DEXERTO (Apr. 24, 2019, 9:08 AM), <https://www.dexerto.com/entertainment/twitch-streamer-doxxes-viewer-after-misunderstanding-donation-as-a-death-threat-571752/> [<https://perma.cc/WW6E-2R4R>].

76. *Id.*

TikToker, Jeffrey Marsh has amassed over 650 thousand followers and over 14 million likes on TikTok.⁷⁷ Shumirun Nessa learned the dangers of being targeted by an influencer's doxing attack when Marsh's viewers retaliated against her for her differing views.⁷⁸ After being doxed, Shumirun's car was vandalized and she received threatening emails and calls detailing not only her information, but her daughter's as well.⁷⁹ When the incident had settled down, Marsh posted a video thanking his "allies" likely alluding to the targeted harassment by his fans directed at Shumirun.⁸⁰

2. Swatting

Swatting "describes the false reporting of an emergency with the goal of having a police unit or special weapons and tactics team deployed."⁸¹ Swatting is a growing problem that can result in injury, property damage, or death.⁸² "Depending on the jurisdiction, there may be little to no relief for the [swatting] victim. Most times the perpetrator is not caught or prosecuted."⁸³ In some states swatting is a criminal offense.⁸⁴

Recognizing the risk of swatting, the FBI formed a national database for police departments to share swatting information across the nation.⁸⁵ In 2019, there were an estimated 1,000 swatting instances nationwide—each instance costing around \$10,000 before accounting for property damages.⁸⁶ The perpetrators of swatting are often not caught because technology enables them to mask everything from their voice to their IP address.⁸⁷

Patrick Tomlinson experienced the dangers of swatting after he was doxed for Tweeting that he never found comedian Norm Macdonald very funny.⁸⁸ Patrick and his wife were swatted over 40 times.⁸⁹ There were no arrests because there is no law criminalizing swatting, and the Tomlinsons struggled to recover

77. Jeffery Marsh (@thejeffreymarsh), TIKTOK, <https://www.tiktok.com/@thejeffreymarsh?lang=en> [<https://perma.cc/3Q62-HJ65>] (last visited Oct. 12, 2023).

78. Gina Florio, *Mother Who Disagreed with Jeffrey Marsh is Doxxed, Threatened, and Harassed by Trans Activists: "Please Don't Come for My Kids"*, EVIE (Mar. 15, 2023), <https://www.eviemagazine.com/post/mother-disagreed-jeffrey-marsh-doxxed-threatened-harassed-trans-activists-kids> [<https://perma.cc/6CMV-XMPP>].

79. *Id.*

80. *Id.*

81. Wash. Rev. Code Ann. § 9A.84.040 (West 2024).

82. *What is Swatting?*, MALWAREBYTES, <https://www.malwarebytes.com/swatting> [<https://perma.cc/4UW4-B9D2>] (last visited Oct. 12, 2023).

83. Elizabeth M. Jaffe, *Swatting: The New Cyberbullying Frontier After Elonis v. United States*, 64 DRAKE L. REV. 455, 457 (2016).

84. Ohio Rev. Code Ann. § 2917.321 (West 2024); Ala. Code § 13A-10-9.1.

85. Jacob Ward & Lora Kolodny, *The FBI has Formed a National Database to Track and Prevent "Swatting,"* NBC NEWS (June 29, 2023), <https://www.nbcnews.com/news/us-news/fbi-formed-national-database-track-prevent-swatting-rcna91722> [<https://perma.cc/BY39-SVRD>].

86. *Id.*

87. *Id.*

88. Bevan Hurley, *This Man Has Been Swatted 47 Times for Making a Joke About Norm Macdonald*, THE INDEPENDENT (Feb. 10, 2024, 11:10 AM), <https://www.the-independent.com/news/world/americas/crime/swatting-nikki-haley-trump-fbi-stalkers-b2494097.html> [<https://perma.cc/HBY4-QU2F>].

89. *Id.*

civily because their stalkers were anonymous, and legal counsel was unaffordable.⁹⁰

Recently, swatting has become a common activity for viewers of live streams.⁹¹ Adin Ross, one of the most popular streamers on the platform Kick, is no stranger to swatting.⁹² He has been swatted in his home, at a boxing gym, and even at Top Golf.⁹³ In August 2022, a SWAT team entered Ross' home while he was streaming after a viewer called the police.⁹⁴ Viewers swatting Ross became such an issue that local police had to change their emergency response procedure for calls to Ross's residence.⁹⁵

Like doxing, platforms such as Twitch have recognized the danger and prevalence of swatting and have issued statements condemning it.⁹⁶ Although platforms recognize these dangers, their policies have little effect on mitigating them.⁹⁷ Platforms can issue a ban on users, but their policies do not have the force of law.⁹⁸ Also, not all bans are equal; Twitch uses an IP ban to prevent banned users from creating new accounts on the same network while bans on Kick, a Twitch alternative, are relatively easy to bypass.⁹⁹ Meanwhile, law enforcement struggles to find perpetrators of doxing or swatting attacks due to the ease of remaining anonymous and cost of identifying online actors.¹⁰⁰

90. *Id.*

91. Emma Hill, *What does Swatted Mean? The Dangerous Crime Targeting Twitch Streamers*, DEXERTO (Aug. 24, 2023), <https://www.dexerto.com/entertainment/what-does-swatted-mean-the-dangerous-crime-targeting-twitch-streamers-1897231/> [<https://perma.cc/78PQ-6UF7>].

92. *Id.*

93. Virginia Glaze, *Adin Ross Swatted Again Just Minutes after Starting Golf Course Stream*, DEXERTO (Aug. 18, 2023), <https://www.dexerto.com/entertainment/adin-ross-swatted-again-just-minutes-after-starting-golf-course-stream-2256786/> [<https://perma.cc/U3H9-XHKJ>].

94. Hill, *supra* note 91.

95. *See* Youtuber Adin Ross the Swatting's Gotta Stop... LAPD Changing its Approach, TMZ (Mar. 11, 2023), <https://www.tMZ.com/2023/03/11/youtuber-adin-ross-swat-swatted-prank-police-calls-lapd-response/> [<https://perma.cc/MN5X-Y6ZS>] (detailing LAPD's new policy to first contact Ross' security team before sending emergency response teams to his residence).

96. Hill, *supra* note 91.

97. *See id.* (acknowledging that streamers continue to be Swatted even after condemnation by Twitch).

98. *See* Dmytro Murko, *Everything You Need to Know About Bans on Twitch*, STREAMSCHARTS (Jan. 6, 2023), <https://streamcharts.com/news/everything-you-need-know-about-bans-twitch> [<https://perma.cc/E7R6-4DAJ>] (acknowledging that bans are for violations of Twitch's private community guidelines); *see also* Preventing Doxing, Swatting, and other IRL Harm, TWITCH, <https://safety.twitch.tv/s/article/Preventing-Doxing-Swatting-and-other-IRL-Harm> [<https://perma.cc/L85N-M4FP>] (last visited Oct. 15, 2024) ("Twitch is not able to reach out to local law enforcement on your behalf.").

99. *Compare* Sara Belcher, *Here's Why Having Your Twitch Account Banned Is Kind of a Big Deal*, DISTRACTIFY (June 15, 2022), <https://www.distractify.com/p/are-twitch-ip-bans-permanent> [<https://perma.cc/CN6E-8ARQ>], *with* Banned from Kik? Get Unbanned And Recover Your Account, SLOTHYTECH, <https://slothotech.com/how-to-get-unbanned-from-kik/> [<https://perma.cc/2NNW-J7MG>] (last updated Mar. 15, 2024).

100. *See* Dan Tynan, *The Terror of Swatting: How the Law is Tracking Down High-Tech Prank Callers*, GUARDIAN (Apr. 15, 2016), <https://www.theguardian.com/technology/2016/apr/15/swatting-law-teens-anonymous-prank-call-police> [<https://perma.cc/DZK8-NVKY>] (describing the difficulty prosecutors face in tracking down online harassers due to the ease of operating anonymously on the internet by masking identifiers like location and phone number. Also noting, it can cost \$100,000 to identify just one hoax caller).

3. *Devious Licks*

Another example of real life social media consequences is the “Devious Licks” trend that took off in September of 2021.¹⁰¹ Started by user “dtx.2cent,” the “Devious Licks” trend prompted students to steal an object from school, take it home, and post a video of it on TikTok.¹⁰² After “dtx.2cent” posted the first Devious Lick on TikTok, the trend exploded and students were posting videos of themselves stealing soap, toilet supplies, urinals, and even smart boards.¹⁰³ Unsurprisingly, the trend got out of hand—students were arrested, schools were vandalized, and chaos ensued.¹⁰⁴ The trend continued until TikTok banned posts with the “Devious Licks” hashtag.¹⁰⁵ TikTok even tweeted its expectation that the TikTok community “create responsibly—online and [in real life].”¹⁰⁶

E. Tort Law’s Vicarious Liability: What Is It, Why Do We Have It, and Does It Work?

The primary purpose of tort law is “compensating plaintiffs for the injuries they have suffered wrongfully at the hands of others.”¹⁰⁷ In addition to encouraging reasonable conduct, tort law aims to equally discourage conduct that creates an unreasonable risk of injury to others.¹⁰⁸ In a sense, tort law acts as a social control—requiring defendants to pay exemplary damages acts as a threat of punishment like the social deterrent seen with criminal law.¹⁰⁹ Unlike criminal law, tort law has historically been a matter of common law.¹¹⁰ The essential elements of a tort claim are (1) a legal obligation of a defendant to the plaintiff, (2) a breach or violation of that right of duty, and (3) an injury attributable to that breach of duty (harm plus causation).¹¹¹

However, sometimes that breaching party is insolvent, so tort law has developed vicarious liability to ensure tort victims are not undercompensated.¹¹² Vicarious liability (sometimes called imputed liability) is liability that a supervisory party bears for the actionable conduct of the subordinate or associate

101. Karishma Rao, “You Will Be Arrested”: Bizarre ‘Devious Lick’ TikTok Trend of Stealing Random Items from School Slammed by Authorities, SPORTSKEEDA (Sept. 13, 2021), <https://www.sportskeeda.com/pop-culture/you-will-arrested-bizarre-deviuous-lick-tiktok-trend-stealing-random-items-school-slammed-authorities> [<https://perma.cc/CCR5-TMQ3>].

102. *Id.*

103. *Id.*

104. *Id.*

105. Kalhan Rosenblatt, *TikTok Removes ‘Devious Licks’ Videos of Students Allegedly Stealing School Property*, NBC News (Sept. 15, 2021, 5:11 PM) <https://www.nbcnews.com/pop-culture/viral/tiktok-removes-deviuous-licks-videos-students-stealing-school-property-n1279286> [<https://perma.cc/CD5P-XX7A>].

106. TikTok (@TikTokComms), TWITTER (Sept. 15, 2021, 4:19 PM) <https://x.com/TikTokComms/status/1438251247753121795> [<https://perma.cc/L2JR-LRVJ>].

107. STUART M. SPEISER ET AL., PURPOSE AND AIMS OF TORT LAW, 1 AM. L. OF TORTS § 1:3 (Mar. 2023) (quoting *Berman v. Allen*, 404 A.2d 8, 11(1979)).

108. *Id.*

109. *Id.*

110. CONG. RSCH. SERV., INTRODUCTION TO TORT LAW, 1 (Updated May 26, 2023).

111. *Caudill v. Wise Rambler, Inc.*, 168 S.E.2d 257, 259 (Va. 1969).

112. Justin Sevier, *Vicarious Windfalls*, 102 IOWA L. REV. 651, 651 (2017).

based on the relationship between the two parties.¹¹³ It allows liability for one person's act or omission to be imputed "by operation of law to another."¹¹⁴ Courts have found vicarious liability to be useful in a variety of situations.¹¹⁵ When employees commit a tort within the scope of their employment, the employer can be liable for the harm done.¹¹⁶ When one party actively induces a third party to infringe a patent, the inducing party is held liable for the third party's infringement.¹¹⁷ Additionally, almost every state has a statute to hold parents liable for intentional or willful acts committed by their minor children.¹¹⁸ Legislators have also recognized the need for vicarious liability in both tort and criminal law.¹¹⁹

III. ANALYSIS

This section will analyze the legislative intent of statutes imposing vicarious liability and describe how courts have used vicarious liability. It will also discuss how successful, or unsuccessful, they would be in light of the aims of tort law and influencers. Because this note recommends combining aspects of respondeat superior, induced infringement, and promotional/product liability to carefully tailor elements that hold influencers liable for harms caused by unreasonable risks that are foreseeable, it will discuss instances of vicarious liability and which elements of each framework should be borrowed for an Influencer Liability Framework.

A. *Influencer Incitement*

Because Cenat was charged with inciting a riot,¹²⁰ it is fitting to begin with an analysis of incitement doctrines and how they would likely fail if applied to influencers. Given the scope of this note, it will primarily apply civil incitement

113. *Liability*, BLACK'S LAW DICTIONARY (11th ed. 2019).

114. *Chee v. Amanda Goldt Prop. Mgmt.*, 143 Cal. App. 4th 1360, 1375 (2006).

115. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 808–10 (1998) (holding that an employer is subject to vicarious liability under Title VII for harm caused to an employee by a supervisor); *see also Broad. Music, Inc. v. Meadowlake, Ltd.*, 754 F.3d 353, 354–55 (6th Cir. 2014) (holding that a restaurant owner was vicariously liable for copyright infringement at his restaurant when it hosted live performances featuring copyrighted music firmly establishing that the Copy Right Act can impose vicarious liability); *see also Morris v. Taco Bell Corp.*, No. 95-2948, 1997 U.S. Dist. LEXIS 12532, at *9–10 (E.D. La. Aug. 14, 1997) (finding the father of a minor could be vicariously liable after the minor was involved in a shooting); *see also Metro-Goldwyn-Mayer Stud. Inc. v. Grokster, Ltd.*, 545 U.S. 913, 929–32 (2005) (discussing the use of vicarious liability in patent infringement where a defendant induces infringement and takes active steps to encourage infringement).

116. *Faragher*, 524 U.S. at 793 ("a master is subject to liability for the torts of his servants committed while acting in the scope of their employment.").

117. 5 DONALD S. CHISUM, CHISUM ON PATENTS § 17.04 (2023).

118. *Parental Responsibility Laws in All 50 States*, MATTHIESEN, WICKERT & LEHRER 1, 1 <https://www.mwl-law.com/wp-content/uploads/2018/02/PARENTAL-RESPONSIBILITY-LAWS-CHART.pdf> [<https://perma.cc/U338-K5AE>] (last updated Jan. 13, 2022).

119. *See, e.g.*, 18 U.S.C. 1962(c) ("It shall be unlawful for any person employed by or associated with any enterprise engaged in . . . the conduct of such enterprise's affairs through a pattern of racketeering activity."); *see also Colo. Rev. Stat. § 7-64-305(1)* ("a partnership is liable for loss or injury caused to a person . . . as a result of a wrongful act or omission, or other actionable conduct, of a partner acting in the ordinary course of business of the partnership or with authority of the partnership.").

120. *Mayorquin & Medina*, *supra* note 8.

statutes and common law. Some state incitement statutes are narrowly tailored.¹²¹ For example, in South Dakota, “a person is personally liable for incitement to riot, and jointly and severally liable for incitement to riot with any other person engaged in the same riot, *to the state or a political subdivision* in an action for damages if the person commits incitement to riot . . .” (emphasis added).¹²² An obvious limitation of South Dakota’s incitement statute is that only government entities can recover from the inciter.¹²³ Additionally, South Dakota’s incitement statute explicitly excludes “oral or written advocacy . . . that *does not* urge the commission of an act or conduct of *imminent force or violence*” (emphasis added).¹²⁴ Lastly, South Dakota’s incitement statute defines “incitement to riot” as any person who (1) with “intent to cause a riot” (2) “commits an act or engages in conduct that urges three or more people . . . to use force or violence to cause any injury to any person or any damage to property, under circumstances in which the force or violence is imminent and the urging is likely to incite or produce the use of force or violence, incites riot.”¹²⁵ “Urging includes instigating, inciting, or directing.”¹²⁶ California, Oklahoma, and Kansas have incitement to riot statutes similar to South Dakota’s.¹²⁷ Commonalities among most incitement statutes include (1) intent or knowledge of, (2) an act that urges people, and (3) creates imminent danger.¹²⁸

The elements of incitement statutes are mirrored in common law decisions.¹²⁹ In *McKesson v. Doe*, the Fifth Circuit held that the leader of a Black Lives Matter protest could be liable for injuries sustained by a police officer who was struck by a heavy object thrown by an unidentified protestor.¹³⁰ In its complaint, the plaintiff-officer alleged the defendant “incited the violence,” “arranged for the protestors to meet . . . directed the protests at all times . . . and

121. See, e.g., S.D. CODIFIED LAWS § 20-9-54 (providing a narrow cause of action for incitement).

122. *Id.*

123. *Id.*

124. *Id.*

125. S.D. CODIFIED LAWS § 20-9-53(2).

126. *Id.*

127. See CAL. PENAL CODE § 404.6(a) (“Every person who with the intent to cause a riot does an act or engages in conduct that urges a riot, or urges other to commit acts of force or violence . . . and at a time and place and under circumstances that produce a clear and present and immediate danger . . . is guilty of incitement to riot.”); see also 21 OKLA. STAT. tit 21, § 1320.2 (“It shall be unlawful and shall constitute incitement to riot for a person or persons, intending to cause, aid, or abet the institution or maintenance of a riot, to do an act or engage in conduct that urges other persons to commit acts of unlawful force or violence . . .”); see also KAN. STAT. ANN. § 21-6201(b) (“Incitement to riot is by words or conduct knowingly urging others to engage in riot . . . under circumstances which produce a clear and present danger of injury to persons or property or a breach of peace.”).

128. See, e.g., S.D. CODIFIED LAWS § 20-9-53(2) (“[A]ny person who, with the intent to cause a riot, commits an act or engages in conduct that urges three or more people, acting together and without authority of law, to use force or violence to cause any injury to any person or any damage to property, under circumstances in which the force or violence is imminent and the urging is likely to incite or produce the use of force or violence, incites riot”).

129. See, e.g., *Doe v. McKesson*, 71 F.4th 278, 294 (5th Cir. 2023) (“[I]t is well settled that incitement to specific unlawful acts may be prohibited without running afoul of First Amendment guarantees.”); see also *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 918 (1982) (describing general First Amendment principles that have been recognized by courts).

130. *McKesson*, 71 F.4th at 281.

did nothing to try to discourage [looting and violence].”¹³¹ When the defendant “lead protestors onto a local interstate to obstruct traffic,” a confrontation arose and the officer was struck.¹³² The Fifth Circuit explained the defendant “could not state a claim against Mckesson for respondeat superior because he could not show that Mckesson had the right to direct the unidentified protestor’s actions.”¹³³ Additionally, the defendant’s conspiracy claim was denied because “he could not show that Mckesson agreed with the protestor to commit the underlying tort.”¹³⁴ However, the court upheld the defendant’s negligence claim by alleging “Mckesson organized and led the protest in an unreasonably dangerous manner, in breach of his duty to avoid creating circumstances in which it is foreseeable that another will be injured.”¹³⁵ The court distinguished Mckesson’s actions from a “lawful protest,” noting, “it is well settled that incitement to specific unlawful acts may be prohibited without running afoul of First Amendment guarantees.”¹³⁶ Specifically, the plaintiff alleged Mckesson’s “directing the protestors to obstruct a public highway, organizing the protest to begin in front of the Baton Rouge police station, and doing nothing to discourage the demonstrators from looting a grocery store and throwing water bottles at police despite Mckesson allegedly exercising some degree of direction and control of the protest” were “likely to incite lawless action.”¹³⁷ The court also assigned a temporal element noting the officer’s injuries “in fact followed within a reasonable period.”¹³⁸ This “reasonable period” differs from the “imminent” or “immediate” standard in incitement statutes.¹³⁹ The court had a knowledge requirement similar to incitement statutes finding, “it is plausible that Mckesson knew or should have known . . . someone might be injured.”¹⁴⁰ The court inferred Mckesson’s knowledge from the fact that he “had recently participated in other Black Lives Matter protests in which demonstrators blocked public highways, and in which police officers were injured.”¹⁴¹ The dissent argued Mckesson’s liability should stop at the unlawful-nonviolent conduct he encouraged claiming he “cannot be liable for violence unless he encouraged violence.”¹⁴² The dissent seems to mirror the “intent” element of statutes and differs from the majorities “knowledge” requirement.¹⁴³

131. *Id.* at 281–83.

132. *Id.* at 282.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.* at 294.

137. *Id.* at 293.

138. *Id.*

139. See S.D. CODIFIED LAWS § 20-9-54 (stating that there is an imminency requirement for the incitement to riot offense); CAL. PENAL CODE § 404.6 (stating that incitement to riot must create an immediate danger).

140. *McKesson*, 71 F.4th at 288.

141. *Id.*

142. *Id.* at 302 (Willet, J., concurring in part).

143. *Id.* at 297, 302 (Willet, J., concurring in part and dissenting in part).

The *Mckesson* dissent relies on *NAACP v. Claiborne Hardware Co.*¹⁴⁴ In *Claiborne*, the defendants, organizers of a boycott, were initially held “liable for the tort of malicious interference with the plaintiffs’ businesses” despite defendant’s First Amendment defense.¹⁴⁵ Boycotters even threatened violence warning “if we catch any of you going in any of them racist stores, we’re gonna break your damn neck.”¹⁴⁶ The plaintiffs alleged defendants were using “‘store watchers’ at the respondents’ business premises,” “‘persuading’ [people] to withhold his patronage,” and “‘using demeaning and obscene language to or about any person’ because that person continued to patronize the respondents.”¹⁴⁷ The Mississippi Supreme Court upheld the initial ruling arguing that the defendants acted for everyone when engaging in “acts of physical force and violence.”¹⁴⁸ In its reversal, the Supreme Court emphasized “that mere *advocacy* of the use of force or violence does not remove speech from the protection of the First Amendment.”¹⁴⁹ This decision reflects that in *Brandenburg v. Ohio*, where the Supreme Court reversed the conviction of a Ku Klux Klan leader for threatening “revengeance” if the “suppression” of the white race continued because the First Amendment only ends when “advocacy is directed to inciting or producing imminent lawless action or is likely to incite or produce such action.”¹⁵⁰

Applied to influencers, the statutes and common law provide frameworks to hold them liable for the torts of their followers. To begin, the First Amendment concerns discussed in *Claiborne* and *Brandenburg*, suggest that influencers must intend their acts produce imminent threats of violence or lawless action.¹⁵¹ This would protect influencers like Cenat who, despite his altruistic intent, created circumstances where lawless action ensued.¹⁵² Meanwhile, influencers who urge violence, via “instigating, inciting, or directing,” would rightfully be held liable for the harm that follows.¹⁵³ However, courts would need to discern where the line between “mere advocacy”¹⁵⁴ ends and incitement begins for every influencer post in question. Absent such a framework, the flexibility of the First Amendment enables influencers to escape liability for their followers’ actions despite the influencer’s advocacy for violence.¹⁵⁵

144. *Id.* at 306 (Willett, J., concurring in part and dissenting in part) (“Even if *Claiborne* allows assigning liability for violence to a protest leader who committed only a nonviolent tort, I believe that tort must at least be intentional.”); *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 927 (1982).

145. *Claiborne*, 458 U.S. at 891.

146. *Id.* at 902.

147. *Id.* at 893.

148. *Id.* at 894.

149. *Id.* at 927.

150. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

151. *Id.*; *Claiborne*, 458 U.S. at 927.

152. See Sottile & Morales, *supra* note 1 (explaining that Cenat had altruistic motives to hold a giveaway for his fans).

153. See S.D. CODIFIED LAWS § 20-9-53(2) (“Urging includes instigating, inciting, or directing.”).

154. *Claiborne*, 458 U.S. at 927.

155. *Id.*

Combining the “likely to incite or produce such action”¹⁵⁶ from *Brandenburg* and the “knowingly urging others” from Kansas’s criminal incitement statute¹⁵⁷ may prove more useful. “Knowingly urging others” fits the “call to action” recommendation, and “likely to incite” fits the foreseeable element. Because incitement often involves intense First Amendment analyses,¹⁵⁸ I turn to more examples of vicarious liability for support of the recommendation.

B. Respondeat Superior: The Impetus of Vicarious Liability in Employment Law

Respondeat superior is “[one] basis upon which the legal consequences of one person’s act may be attributed to another person.”¹⁵⁹ “Under . . . respondeat superior, an employer can be held vicariously liable . . . for the torts of an employee committed within the scope of [their] employment.”¹⁶⁰ The employee’s tort is imputed onto the employer regardless of employer fault or knowledge.¹⁶¹

Respondeat superior is frequently applied to “acts that have not been specifically directed by an employer but that are the consequence of inattentiveness or poor judgment on the part of an employee acting within the job description.”¹⁶² However, respondeat superior is inapplicable when the employer does not control the employee, and their relationship must rise to the level of an employee acting within the scope of employment.¹⁶³ An employee acts within the scope of employment when (1) they perform work assigned by the employer, or (2) they engage in a course of conduct controlled by the employer.¹⁶⁴ However, when an employee acts independently in a manner not intended to benefit the employer, that employee is not acting within the scope of employment.¹⁶⁵

1. Respondeat Superior and Motivation

A common standard for whether an employee acted within the scope of employment is to inquire what motivated the employee to commit the

156. *Brandenburg*, 395 U.S. at 447.

157. KAN. STAT. ANN. § 21-6201(b).

158. See *Mckesson v. Doe*, 144 S. Ct. 913, 914 (2024) (citing *Counterman v. Colo.*, 600 U.S. 66, 76 (2023)) (“[T]he First Amendment precludes punishment [for incitement], whether civil or criminal, unless the speaker’s words were ‘intended’ (not just likely) to produce imminent disorder.”).

159. Restatement (Third) of Agency § 2.04 (2006).

160. JOEL W. MOHRMAN & ROBERT J. CALDWELL, 1 HANDLING BUSINESS TORT CASES § 3:2 (2020).

161. *Id.*

162. Restatement (Third) of Agency § 2.04 cmt. b (2006).

163. See Restatement (Third) of Agency § 7.07 (2006) (detailing when an employee acts within the scope of employment); see also *Hendley v. Springhill Mem’l Hosp.*, 575 So. 2d 547, 550 (Ala. 1990) (“[T]he determinative question becomes whether the act committed by the employee was done while acting within the line and scope of his employment.”).

164. Restatement (Third) of Agency § 7.07(2) (2006).

165. *Id.*

wrongdoing.¹⁶⁶ In *Hendley v. Springhill Memorial Hospital*, the Alabama Supreme Court, applying a motive test, found an employee may be acting outside the scope of his employment even though an act is done during employment.¹⁶⁷ In determining whether the hospital-defendant was liable for sexual assault committed by a hospital employee against the patient-plaintiff,¹⁶⁸ the court announced “[i]t is a general rule that where an employee abandons his employer’s business for personal reasons the employment is suspended and the employer is not liable for the actions of the employee during the temporary lapse in employment”¹⁶⁹ The court further acknowledged an employee is no longer acting within the scope of employment when “the employee [is] acting from personal motives having no relationship to the business of the employer.”¹⁷⁰

Because the *Hendley* assault was committed for “wholly personal motives having no relation to the business,” the hospital was not liable for the employee’s sexual assault.¹⁷¹ Several other states also excuse employers from liability for employee actions when the employee is motivated for reasons other than furthering business while holding them liable for acts done by an employee in furtherance of or to benefit the employer.¹⁷² Put simply, “an intentional and willful attack committed by an agent or employee, to vent his own spleen against the injured person, is a clear departure from his employment. . . .”¹⁷³ In mixed motivation scenarios where an employee’s wrongdoing, although personally motivated, advances the interests of the employer, the key inquiry is whether “the primary motivation for the activity is personal.”¹⁷⁴

166. See *Hendley*, 575 So. 2d at 550 (explaining that a tort committed by an agent “is not attributable to the principal if it emanate from wholly personal motives . . . and was committed to gratify wholly personal objectives or desires of the agent”).

167. *Id.* at 551.

168. See *id.* at 550 (“A tort committed by an agent, even if committed while engaged in the employment of the principal, is not attributable to the principal if it emanated from wholly personal motives of the agent and was committed to gratify wholly personal objectives or desires of the agent.”).

169. *Id.*

170. *Id.*

171. *Id.* at 551.

172. See *Taylor v. Doctors Hosp.*, 486 N.E.2d 1249, 1251 (Ohio Ct. App. 1985) (holding that defendant-hospital’s employee’s sexual assault on plaintiff-patient stemmed “from intensely personal motives” and “in no way served to further or promote the business of the employer” after a radiation orderly sexually assaulted a patient for his own gratification under the guise of physical therapy); *Berry v. Com. Ins. Co.*, 175 N.E.3d 383, 389 (Mass. 2021) (finding a police department was not liable for injuries caused by a police officer who negligently struck a fellow officer with a vehicle, after speeding towards the victim and slamming the breaks, during a paid lunch break on the employer’s property because “his unsafe driving was not motivated . . . by a purpose to serve his employer” and such reckless driving did not “further[] the interests of the town.”); *Bagent v. Blessing Care Corp.*, 862 N.E.2d 985, 988, 996 (Ill. 2007) (reversing the appellate court’s ruling that defendant-hospital was liable for its employee’s unpermitted disclosure of plaintiff-patient’s pregnancy test to the employee’s friend in a public setting because the employee was motivated by personal social factors and “not related to her position as an employee of [defendant].”); *Baker v. Saint Francis Hosp.*, 126 P.3d 602, 607 (Okla. 2005) (reversing the trial court’s summary judgment in favor of plaintiff because the defendant-employer could not be liable for its daycare employee who hit a child’s head on a cubby in a conscious attempt to harm the child out of personal irritation or annoyance).

173. *Schulman v. Cleveland*, 283 N.E.2d 175, 176 (Ohio 1972).

174. See *Clover v. Snowbird Ski Resort*, 808 P.2d 1037, 1041 (Utah 1991) (explaining that if the motivations benefit both the employer and personal interest, the actions are usually within the scope of employment, but if the primary motivation serves personal interest, it is not in the scope of employment).

2. *Alternatives to The Motivation Test*

To apply respondeat superior, courts ask if the act was committed within the scope of employment.¹⁷⁵ In *Lange v. National Biscuit Co.*, the Minnesota Supreme Court abandoned the standard “motivation test” when the plaintiff was physically assaulted by the defendant’s employee over a shelf space dispute in the plaintiff’s grocery store for the defendant’s products.¹⁷⁶ Rejecting the “motivation test,” the court favored a test that focused on “the *basis* of the assault rather than the motivation of the employee.”¹⁷⁷ It found that determining when an act leaves the “sphere of the employer’s business and become[s] motivated by personal animosity” is unduly restrictive.¹⁷⁸

Instead, it held “an employer is liable for an assault by his employee when the source of the attack is related to the duties of the employee and the assault occurs within work-related limits of time and place.”¹⁷⁹ The Minnesota Supreme Court’s approach, thus, has causation, and temporal and geographical requirements.¹⁸⁰ The causation requirement is necessary because it ensures the “employee originally was motivated . . . in *furtherance of his employer’s business*.”¹⁸¹ The approach taken by the Minnesota supreme court—focusing on the conflict’s origin—has been seen in a limited number of courts.¹⁸²

3. *Respondeat Superior Foreseeability on Expectations*

Foreseeability is often relevant in determining whether an employee acted within the scope of their employment.¹⁸³ Whether an employee’s actions were foreseeable is sometimes answered by asking whether its actions were expected in view of the employee’s duties.¹⁸⁴ Examples of actions that are foreseeable because they are not unexpected in view of an employee’s duties include

175. See *Lange v. Nat’l Biscuit Co.*, 211 N.W.2d 783, 784 (Minn. 1973) (“There is no dispute with the general principle that in order to impose liability on the employer under the doctrine of respondeat superior it is necessary to show that the employee was acting within the scope of his employment.”).

176. *Id.* at 784–85.

177. *Id.* at 785 (emphasis added).

178. *Id.* at 785–86.

179. *Id.* at 786.

180. *Id.*

181. *Id.* (emphasis added).

182. See *Lyon v. Carey*, 533 F.2d 649, 655 (D.C. Cir. 1976) (“If the assault, sexual or otherwise, was triggered off or motivated or occasioned by a dispute over the conduct—then and there—of the employer’s business, then the employer should be liable.”).

183. See BARRY A. LINDAHL, *RESPONDEAT SUPERIOR –LIABILITY BASED ON FORESEEABLE RISK*, 1 MOD. TORT L. LIAB. AND LITIG. § 7:3, (May 2023) (“Foreseeability . . . is a foresight which must impel the prudent person to perceive the harm likely to flow from long-range activities despite all reasonable precautions on the [employer’s] own part.”).

184. See Restatement (Second) of Agency § 245 (1958) (“A master is subject to liability for the intended tortious harm by a servant . . . although the act was unauthorized, if the act was not unexpected in view of the duties of the servant.”). See also *Floyd-Mayers v. Am. Cab Co.*, 732 F. Supp. 243, 246 (D.C. 1990) (“An employee’s act is within the scope of [their] employment if . . . the act is not unexpected in view of the employee’s duties.”); *Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1351 (4th Cir. 1995) (finding the “determination of whether an employee’s acts are within the scope of his employment requires an examination of . . . whether the act was foreseeable”); *Sunseri v. Puccia*, 422 N.E.2d 925, 930 (Ill. App. Ct. 1981) (“An employer is liable for intentional torts of an employee which are not unexpected in view of the latter’s duties.”).

discriminatory acts committed by taxicab drivers,¹⁸⁵ sexual harassment committed by a hotel general manager,¹⁸⁶ and a shopkeeper errantly shooting a bystander when attempting to stop a robbery.¹⁸⁷

Other courts assess foreseeability by asking “whether the misconduct was such that it may be fairly regarded as typical of or incidental to the employee’s work or the duties the employee is hired to perform.”¹⁸⁸ The type of work an employee is performing may be determinative of whether the misconduct is typical of the work they perform.¹⁸⁹ Sexual harassment targeted at one employee by another is not “typical of or broadly incidental to the operation of a county jail.”¹⁹⁰ Meanwhile, a maintenance worker assaulting a competitor’s employee, thinking they were stealing from defendant’s employer, was “incidental to” and thus “foreseeable given his employment and the duties he undertook.”¹⁹¹

4. *Respondeat Superior Foreseeability Based on Knowledge*

Another foreseeability standard is when an employer knows of an employee’s “unfitness, incompetence, or dangerous attributes” it should reasonably foresee the potential harm to the general public due to the risk created by the employee’s qualities.¹⁹² The Court of Appeals of Georgia held a daycare was not liable for plaintiff’s broken arm after finding the injury was not reasonably foreseeable because there was no evidence the employee had any tendencies or propensities suggesting she would cause the type of harm plaintiff sustained.¹⁹³ Likewise, the South Dakota District court held an employer was not liable for a drunk driving accident caused by an employee driving a stolen company vehicle after considering the totality of the circumstances.¹⁹⁴ It found that type of conduct was “not within the class of reasonably foreseeable hazards from which [defendant] had a duty to protect [p]laintiff.”¹⁹⁵

However, a police department can be liable via respondeat superior for harm caused by an off-duty officer’s negligence in failing to secure his firearm because it is reasonably foreseeable that an officer would fail to secure their firearm when returning from work.¹⁹⁶ It was also foreseeable that United States Coast Guard members would return from shore leave drunk and damage other ships on the dock.¹⁹⁷ The Second Circuit Court of Appeals found drunken

185. *Floyd-Mayers*, 732 F. Supp. at 247.

186. *See Martin*, 48 F.3d at 1352 (finding sexual assaults were foreseeable because the employee manual specifically prohibited them).

187. *See Frederick v. Collins*, 378 S.W.2d 617, 619 (Ky. 1964) (explaining that the shopkeeper was in sole charge of the store and under obligation to manage and protect the store).

188. LINDAHL, *supra* note 183.

189. *See id.* (“The question is whether the misconduct was such that it may be fairly regarded as typical of or incidental to the employee’s work or the duties the employee is hired to perform.”).

190. *Farmers Ins. Grp. v. Cnty. of Santa Clara*, 906 P.2d 440, 444 (Cal. 1995).

191. *Kirlin v. Halverson*, 758 N.W.2d 436, 446 (S.D. 2008).

192. *Di Cosala v. Kay*, 450 A.2d 508, 518 (N.J. 1982).

193. *Child.’s World Learning Ctr. v. Carter*, 879 S.E.2d 811, 815 (Ga. Ct. App. 2022).

194. *Medina v. Botello*, 595 F. Supp. 3d 838, 860 (D.S.D. 2022).

195. *Id.* at 853.

196. *Perez v. City & Cnty. of San Francisco*, 75 Cal. App. 5th 826, 841–42 (2022).

197. *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167, 172 (2d Cir. 1968).

damage foreseeable due to “the proclivity of seamen to . . . resort to the bottle while ashore.”¹⁹⁸ Because the Coast Guard knew its sailors would be intoxicated, the court found it fair to hold the Coast Guard liable for the type of damage drunken sailors might cause to a dock.¹⁹⁹ A school district was held vicariously liable for sexual harassment committed by an employee after the court found it was reasonably foreseeable that the employee would commit sexual harassment because he had previously been disciplined for similar conduct, and the school knew about it.²⁰⁰

5. *Respondeat Superior Applied to Influencers*

The previous subsections of this note summarized key factors courts assess in determining whether an employee acted within the scope of employment (1) the impetus of the wrongdoing (assessing the motivation or the basis of the wrongdoing) and (2) foreseeability (assessed by expectations or knowledge).²⁰¹ This subsection will consider how effective the same factors would be in assigning liability for torts committed by followers to streamers and influencers.

Before diving into whether respondeat superior when applied to streamers and influencers satisfies the aims of tort law, the elephant in the room should be addressed—viewers and followers are not employees.²⁰² Although streamers and influencers do not employ their viewers,²⁰³ and this note aims at discerning if and when streamers and influencers are liable for torts committed by their viewers or followers, the evaluation of intent, foreseeability, and the standards available for both warrant a discussion.

Like employers, influencers exert a sense of control over their audience.²⁰⁴ Control over employees is a key reason for the existence of respondeat superior.²⁰⁵ The purchasing decisions of viewers are easily influenced by their favorite online personality.²⁰⁶ Viewers are psychologically predisposed to

198. *Id.*

199. *Id.*

200. *Doe-3 v. McLean Cty. Unit Dist. No. 5 Bd. Of Dirs.*, 973 N.E.2d 880, 891 (Ill. 2012).

201. See discussion *supra* Sections III.B.1–4 (detailing how scope of employment is assessed).

202. 29 U.S.C. § 630(b), (f) (“The term ‘employer means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year,” and “the term ‘employee’ means an individual employed by any employer except . . .”). See also *Follower*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/follower> [<https://perma.cc/558B-HZNV>] (defining “follower” as “one who subscribes to a feed especially on social media”) (last visited Sept. 27, 2024); *Viewer*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/viewer> [<https://perma.cc/SE8W-WCDM>] (defining “viewer” as “one that views”) (last visited Sept. 27, 2024).

203. See *What Is an Influencer? – Social Media Influencers Defined [Updated 2024]*, INFLUENCER MARKETING HUB (Aug. 30, 2024), <https://influencermarketinghub.com/what-is-an-influencer/> [<https://perma.cc/7N79-KYP5>] (explaining that social media influencers “built their influence solely from being present on social media and creating content”).

204. See Lajnef, *supra* note 22 (explaining that teens mimic social media influencers).

205. See Restatement (Third) of Agency § 2.04 (2006) (defining “respondeat superior”).

206. See Shee, *supra* note 13 (“Brands are no longer relying strictly on traditional paid advertising channels, they are tapping [influencers] to create content that is tailored to reach new audiences.”).

recreate viral trends.²⁰⁷ And as mentioned above, an influencer’s call to action is often heeded by loyal fan bases.²⁰⁸

a. The Impetus of Viewer Actions

Applying the respondeat superior methods for determining scope of employment by assessing the impetus of a viewer’s wrongdoing has two possible standards.²⁰⁹ Under a motive test, courts would ask whether the viewer “[is] acting from personal motives having no relationship to the [streamer].”²¹⁰ If the viewer acts for purely personal motives, then the streamer would not be liable.²¹¹ However, if the viewer is motivated to further the interests of the streamer, then the viewer would be acting within the scope of their relationship to the streamer.²¹²

The Jeffery Marsh situation illustrates this exact situation.²¹³ Their viewers committed torts by doxing someone who disagreed with their videos.²¹⁴ Their subsequent approval of their actions demonstrates the viewer’s tortious acts did further their interests.²¹⁵ Contrasting the actions of Marsh’s viewers to hospital employees who sexually abuse patients for non-medical and purely personal reasons, it is easy to see the difference between “wholly personal”²¹⁶ and having a “relationship to the [influencer].”²¹⁷ Under this Influencer Framework for respondeat superior, Marsh could be liable for the vandalism of Shumirun’s car and the threats she received.²¹⁸

While the motive test appropriately weighs the motive of the wrongdoer and the relationship of the act to their employer, the standard focusing on the basis of wrongdoing does not.²¹⁹ Under a basis approach for the Influencer Liability Framework, a court would ask whether “the source of the [tort] is

207. See Vasukam, *The Psychology Behind Viral Social Media Challenges and Trends*, LINKEDIN (Aug. 15, 2023), <https://www.linkedin.com/pulse/psychology-behind-viral-social-media-challenges-trends-vasukam/> [<https://perma.cc/LQM7-5E37>] (“Viral challenges frequently elicit powerful emotions, promoting a sense of belonging among players.”).

208. See Panella, *supra* note 71 (recalling how a reporter, after criticizing Taylor Swift’s tour was sent messages Doxing his personal information, threatened his life, called him slurs, and lodged threats against his loved ones and friends); Florio, *supra* note 78 (recounting how a TikTok disagreed with a trans activist, resulting in “the LGBT mob” doxing, harassing, and threatening the TikTok and their children and their children).

209. See *supra* Part III.B.1 (discussing the “motive” test); see also *supra* Part III.B.ii (discussing the “basis” approach).

210. *Hendley v. Springhill Mem’l Hosp.*, 575 So. 2d 547, 550 (Ala. 1990).

211. *Id.*

212. See *Berry v. Com. Ins. Co.*, 175 N.E.3d 383, 389 (Mass. 2021) (stating one factor in determining employer liability as whether or not the conduct was motivated “by a purpose to serve the employer”).

213. Florio, *supra* note 78.

214. *Id.*

215. *Id.*

216. *Hendley v. Springhill Mem’l Hosp.*, 575 So.2d 547, 549–50 (Ala. 1990).

217. *Id.* at 550.

218. See Florio, *supra* note 78 (detailing the damage done to TikTok Massa’s car, as well as the threats made to her).

219. See *Hendley*, 575 So.2d at 550 (“[a] tort committed by an agent . . . is not attributable to the principal if it emanated from wholly person motives of the agent . . .”). See *Lange v. Nat’l Biscuit Co.*, 211 N.W.2d 783, 786 (Minn. 1973) (holding that employers are liable for a tort by an employee when the source of the tort related to the employee’s duties and is within the limits of work time and place).

related to the duties of the [viewer] and the [tort].”²²⁰ Such an approach would be far too broad for assessing an influencer-follower relationship. Because influencers are so influential,²²¹ it is easy to claim that actions as simple as purchasing an item or selecting a haircut is related to the follower’s relationship with the influencer. This would be overreaching and unfair to influencers. For example, it would not distinguish between the rogue and unpredictable acts of hundreds at Cenat’s Riot²²² and the targeted and praised acts of Marsh’s followers.²²³

b. What Can Influencers Foresee?

Since the Internet launched, trends online have existed.²²⁴ Viewers see something exciting or interesting and want to copy it.²²⁵ Among teenagers, the influence of social media has raised concerns.²²⁶ The advent of social media made peer pressure a risk outside of physical environments.²²⁷ When teenagers see risky behavior “[t]hey want to equal it and make it their own by increasing the danger, risk, sexualization, violence, aggression.”²²⁸ That urge exists both online and face-to-face.²²⁹ However, social media “aligns perfectly with the tendencies of the teenage brain”²³⁰ It offers “new and novel experiences” to teenagers’ brains seeking “feel-good hormones” which are easily found by engaging in dangerous activities and receiving social affirmations.²³¹ On social media, teenagers can easily find social acceptance and feel connected even if it is through “outrageous online dares.”²³² In a classic case of monkey-see-monkey-do social media platforms expose impressionable teenagers to objectionable material they are likely to imitate in pursuit of the same reverence they view the original poster with.²³³ When a teen sees an influencer or streamer

220. *Lange*, 211 N.W.2d at 786.

221. *Id.*; See Christopher Hazell, *The Rise of the Social Media Influencer*, VIEWPOINT (Aug. 2, 2019) <https://viewpoint.pointloma.edu/the-rise-of-the-social-media-influencer/> [https://perma.cc/A359-4BAG] (“[influencers] have the power to sway their followers’ purchasing behavior, thinking, and even beliefs.”).

222. See Sottile & Morales, *supra* note 1 (highlighting that Cenat intended for the giveaway to be a “positive experience” rather than the riot it devolved into).

223. Florio, *supra* note 78.

224. See E. Weaver, 25 *Remarkable Internet Trends Before 2025*, LIST 25 (Jan. 23, 2024), <https://list25.com/25-remarkable-internet-trends-before-2005/> [https://perma.cc/J3GD-LLTC] (recounting Internet trends in the early days of its existence).

225. *Why People Copy Each Other Online and What we Can Learn*, SOC. MEDIA TODAY (Apr. 24, 2009), <https://www.socialmediatoday.com/content/why-people-copy-each-other-online-and-what-we-can-learn> [https://perma.cc/NX8K-LH38].

226. See Patti Neighmond, *Of Cigs and Selfies: Teens Imitate Risky Behavior Shared Online*, NPR (Mar. 10, 2014, 2:57 AM), <https://www.npr.org/sections/health-shots/2014/03/10/258690319/of-cigs-and-selfies-teens-imitate-risky-behavior-shared-online> [https://perma.cc/WN43-VZJF] (“Students who saw images of partying with comments posted by friends were about 20 percent more likely to become drinkers or smokers themselves”).

227. *Id.*

228. *Id.*

229. See *id.* (“online influence still pales compared to face-to-face influence”).

230. Jessica Firger, *Why Teens are Drawn to Social Media Dares*, CBS NEWS (Apr. 23, 2015), <https://www.cbsnews.com/news/why-teens-are-drawn-to-social-media-dares/> [https://perma.cc/6R98-KPS6].

231. *Id.*

232. *Id.*

233. See *supra* notes 224–32 and accompanying text (detailing the influence of social media on teenagers).

tell a viewer or follower something, it is foreseeable the viewer or follower would trust them.²³⁴ This is because teenagers are minors and are “easily influenced due to various factors such as peer pressure, media, and their developing brains.”²³⁵

Streamers and influencers are aware of the influence they have.²³⁶ Influencers can easily track their following and engagement.²³⁷ Following the Cenat incident,²³⁸ popular streamer JiDion shared his thoughts in a YouTube video.²³⁹ JiDion, although surprised by the crowd, discussed how a popular streamer like Cenat should have known that such an event created the likelihood that thousands of people would show up comparing Cenat’s fans to those of Mr. Beast and Taylor Swift.²⁴⁰ He went on to note that Cenat’s crowd was made of mainly teenage boys who in general “don’t know how to act” and that it was a perfect example of why not to idolize influencers.²⁴¹ JiDion raised his concerns for the extensive damage caused by people who see one person cause damage and then replicate their behavior.²⁴² Taking a moment to reflect on his influence, JiDion stated that it is hard for influencers to think of all the consequences when they are so focused on creating content.²⁴³ Concluding, JiDion said Cenat and his management are to blame for letting him go through with it because the risk was too high.²⁴⁴

To assess foreseeability, one could evaluate whether the viewer’s actions were expected in view of the viewer’s duties.²⁴⁵ However, viewers do not owe any duty to streamers.²⁴⁶ Thus, like several courts, I first will assess foreseeability by asking “whether the misconduct was such that it may be fairly

234. See *20 Surprising Influencer Marketing Statistics*, DIGIT. MKTG. INST. (Oct. 19, 2021), <https://digitalmarketinginstitute.com/blog/20-influencer-marketing-statistics-that-will-surprise-you> [<https://perma.cc/UY4J-DK9P>] (“Gen Zers generally trust influencers more than celebrities.”).

235. *Are Teenagers Easily Influenced*, SOCIALSTAR (July 13, 2023), <https://officialsocialstar.com/blogs/blog/are-teenagers-easily-influenced> [<https://perma.cc/27QH-NLLU>].

236. See Tyler Erzberger, *Ninja Talks Fortnite, Chicago and Being a Role Model for Younger Audiences*, ESPN (July 21, 2018), https://www.espn.com/esports/story/_id/24159881/ninja-talks-fortnite-chicago-being-role-model-younger-audiences-red-bull-rise-dawn-event [<https://perma.cc/KX3H-RS8V>] (describing how Ninja aims for family-friendly content to be a good role model).

237. See *Social Media Analytics: How to Find Your Followers*, SHIFT, <https://www.shiftcomm.com/thinking/social-media-analytics-how-to-find-your-followers> [<https://perma.cc/5MQW-MR3E>] (last visited Oct. 1, 2024) (discussing how to easily find and analyze follower data across social media platforms).

238. See *supra* notes 1–9 and accompanying text (detailing the riot at a Kai Cenat giveaway in New York).

239. @JiDionPremium, *JiDion Gives his Thoughts on the Kai Situation...*, YOUTUBE (Aug. 6, 2023), <https://www.youtube.com/watch?v=jYrmSGaHHjQ> [<https://perma.cc/3GRA-QJGU>].

240. *Id.*

241. *Id.*

242. See *id.* (criticizing the damage done to vehicles and other property during the Kai Cenat giveaway turned riot).

243. *Id.*

244. *Id.*

245. See Restatement (Second) of Agency § 245 (1958) (detailing one way to determine whether an act was foreseeable under respondeat superior).

246. See Creators’ Legal, *Lights, Camera, Legal: Understanding the Legal Landscape of Live Streaming*, MEDIUM (Dec. 22, 2023), <https://creatorslegal.medium.com/lights-camera-legal-understanding-the-legal-landscape-of-live-streaming-c8d4d12f63b5> [<https://perma.cc/ZY8C-TFBB>] (outlining streamers’ responsibility to respect privacy rights, defamation, and harassment and to avoid copyright infringement and revenge pornography but makes no mention of a broader duty owed to their viewers).

regarded as typical or incidental to the employee’s work or the duties the employee is hired to perform.”²⁴⁷

Although influencers do not hire their viewers, they can certainly exert their control to get a desired reaction.²⁴⁸ When Marsh sent his fans after Shumirun, her car was vandalized, her information was exposed, and online threats were directed towards her.²⁴⁹ Similar to how parents who exercise control over their minor child to commit a tort are held liable,²⁵⁰ influencers like Marsh who use their control to cause damage should be liable. Put simply, influencers know what will happen when they request their loyal fans to do something—they will do it; in these situations, a tort being committed is foreseeable.²⁵¹

Another approach is to ask whether “the [viewer’s] misconduct could be reasonably foreseen by the [influencer] in any event.”²⁵² When an influencer knows of a viewer’s “unfitness, incompetence, or dangerous attributes” it should reasonably foresee the potential harm to the general public due the risk created by the viewer’s qualities.²⁵³ However, it is difficult for influencers to know specific attributes about their viewers or followers.²⁵⁴ Twitch streamers can only see viewer usernames if they have logged in with a Twitch account, which is not required to view.²⁵⁵ Even then, they can only see the viewer’s username and region.²⁵⁶ Similarly, “Instagram only provides insights such as follower count, reach, and engagement metrics to help influencers track their performance and audience engagement.”²⁵⁷ These menial data points are not nearly as indicative of poor behavior as prior sexual assault accusations for a teacher.²⁵⁸ Plus, streamers and influencers can have millions of followers.²⁵⁹ It would be unreasonable for streamers or influencers to know every quality every viewer

247. LINDAHL, *supra* note 183.

248. See Florio, *supra* note 78 (describing, for example, how Jeffrey Marsh exerted his control to have online threats be directed at Shumirun); see also Henrik Jodén and Jacob Strandell, *Building Viewer Engagement through Interaction Rituals on Twitch.tv*, 25 INFO., COMM’N, AND SOC’Y 1969, 1970 (2022) (“[s]uccessful streamers make good use of technical affordances for interaction, such as appearing on-screen via a web camera or having a separate monitor dedicated to the viewer chat.”).

249. Florio, *supra* note 78.

250. See *Snow v. Nelson*, 475 So. 2d 225, 226 (Fla. 1985) (“[A] parent may incur liability . . . where the child committing the tort is acting as the servant or agent of its parents [or] where the parent consents, directs, or sanctions the wrongdoing. . .”).

251. See *supra* notes 1–9 and accompanying text (detailing, for example, the riot at a Kai Cenat giveaway in New York); see also Florio, *supra* note 78 (providing an example of how an influencer and their content can incentivize and guide fans to perform an act).

252. *Martinez v. Hagopian*, 182 Cal. App. 3d 1223, 1228 (Cal. Ct. App. 1986).

253. *Di Cosala v. Kay*, 450 A.2d 508, 518 (N.J. 1982).

254. *Can Twitch Streamers See Who’s Watching? – The Truth Here*, ESPORTS, <https://www.esports.net/streaming/can-twitch-streamers-see-who-is-watching/> [<https://perma.cc/P9W7-NPZ7>] (last visited Oct. 1, 2024).

255. *Id.*

256. *Id.*

257. *Can Instagram Influencers See Who Views Their Page?*, SOC. STAR (July 14, 2023), <https://officialsocialstar.com/blogs/blog/can-instagram-influencers-see-who-views-their-page> [<https://perma.cc/8VER-MHGQ>].

258. See *Doe-3 v. McLean Cty. Unit Dist. No. 5 Bd. Of Dirs.*, 973 N.E.2d 880, 885, 891 (Ill. 2012) (finding that a school district owed a duty of care to students to use reasonable care in ensuring that the teacher’s information regarding previous instances of sexual abuse was on file and accurate).

259. Fabio Duarte, *Most Followed Accounts on Social Media (Oct 2024)*, EXPLODING TOPICS (Sept. 26, 2024), <https://explodingtopics.com/blog/social-media-following> [<https://perma.cc/PY9Y-LD5M>].

has and assign blame to them for failing to prevent harm caused by their actions and the viewers' unique qualities.

Asking “whether the misconduct was such that it may be fairly regarded as typical or incidental to the [viewer’s] work or the duties the [viewer] is hired to perform,”²⁶⁰ is also inapplicable to an influencer-follower relationship. In respondeat superior, such an approach focuses on the defendant’s employee’s specific area of work.²⁶¹ In the context of streamers and influencers, it would place an undue burden on the court to define the scope of what the influencer asks the viewer to do.²⁶² Additionally, courts would need to discern what is incidental and what is not.²⁶³ Such a determination is too factually complex, especially for mass tort cases like the Cenat riot,²⁶⁴ for courts to decide.

C. *Assigning Vicarious Liability to Influencers Using Intellectual Property Theories of Induced Infringement*

This subsection will first cover the reason for and elements necessary for vicarious liability to be assigned in Copyright and Patent infringement cases. Because inducement is most applicable to influencers,²⁶⁵ it will focus mainly on induced infringement. It will then determine how effective the principles and elements of induced infringement would be in assigning vicarious liability to influencers for torts committed by their followers.

1. *Intellectual Property: Vicarious liability for Copyright and Patent Infringement*

Assigning vicarious liability in copyright infringement cases “is grounded on the recognition that adequate protection of a [copyright] monopoly may require the courts to look beyond actual duplication to the products or activities

260. LINDAHL, *supra* note 183.

261. *Id.*

262. See *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004) (quoting *Gershwin Publ’g Corp. v. Columbia Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971)) (“One who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another may be liable as a ‘contributory’ [copyright] infringer.”); see, e.g., *Sottile & Morales*, *supra* note 1 (“Social media influencer Kai Cenat has been charged with inciting a riot and unlawful assembly after thousands-strong crowds gathered . . . AMP . . . acknowledged Friday’s events, saying they don’t condone the behavior of fans that attended the planned event.”); see also *id.* (“Cenat . . . said during a Wednesday Twitch stream that he would be hosting a ‘huge giveaway’ . . . New York City Mayor Eric Adams said . . . ‘You don’t come to get free GameBoys and bring smoke bombs’ . . .”).

263. See *Power Integrations v. Fairchild Semiconductor Int’l, Inc.*, 843 F.3d 1315, 1332 (Fed. Cir. 2016) (quoting *Astronet Techs. Inc. v. BAE Sys., Inc.*, 802 F.3d 1271, 1279 (Fed. Cir. 2015)) (“To prove inducement of infringement, the patentee must show that the accused inducer took an affirmative act to encourage infringement with the knowledge that the induced acts constitute patent infringement.”); See LINDAHL, *supra* note 183 (“The question is whether the misconduct was such that it may be fairly regarded as typical of or incidental to the employee’s work . . .”).

264. LINDAHL, *supra* note 183; *Sottile & Morales*, *supra* note 1.

265. See *UMG Recordings v. Vital Pharms., Inc.*, No. 21-cv-60914-CIV-DIMITROULEAS/SNOW, 2022 U.S. Dist. Lexis 241138, at *1, *17-18 (S.D. Fla. July 11, 2022) (“Plaintiffs argue that Bang is liable for contributory copyright infringement because the undisputed facts demonstrate that Bang intentionally induced and encouraged the Bang Influencers to create and post videos on TikTok promoting Bang’s products and incorporating Plaintiffs’ copyrighted music.”).

that make such duplication possible.”²⁶⁶ Without the inducer, the direct infringement and harm that follows would not occur, so it is appropriate to hold the inducer liable for damages.²⁶⁷ Induced infringement “reflects the basic moral and legal principle that those who assist bad acts by others should be liable for those acts.”²⁶⁸ In practice, it prevents ongoing infringement, provides a remedy for patent or copyright holders when the direct infringer is judgment proof, and deters infringement.²⁶⁹

In *Grokster*, the Court answered the question of under what circumstances the distributor of a product is liable for copyright infringement by a third party.²⁷⁰ The rule on inducement of infringement imputes liability when defendants take “active steps . . . to encourage direct infringement, such as advertising . . . or instructing . . . shows an affirmative intent that the product be used to infringe.”²⁷¹ *Grokster* was found vicariously liable on the theory of inducement because it knew it was satisfying a demand for infringing content, it supplied services used primarily to bring infringement, it did not filter out infringing content, and it made money through ads.²⁷² Knowledge of direct infringement is necessary to hold an inducer liable for a third party’s copyright infringement.²⁷³

Knowledge for such infringement includes “both those with *actual knowledge* and those who *have reason to know* of direct infringement.”²⁷⁴ In *Ellison v. Robertson*, AOL was shown to have had reason to know of direct infringement because it had received complaints about copyrighted material being transmitted on their services and a subscriber called AOL.²⁷⁵ AOL claimed to have not received the complaints, but the court did not accept that excuse because “AOL changed its e-mail address in an unreasonable manner.”²⁷⁶

In addition to knowledge, proving inducement of copyright infringement requires “‘active steps . . . taken to encourage direct infringement’” that “show an affirmative intent that the product be used to infringe.”²⁷⁷ Distributing a device with the object of promoting its use to infringe a copyright is an example of a clear expression or an affirmative step to encourage infringement.²⁷⁸

266. Greer v. Moon, 83 F.4th 1283, 1286 (10th Cir. 2023) (quoting Sony Corp. of Am. V. Universal City Studios, Inc., 464 U.S. 417, 442 (1984)).

267. See *id.* at 1294 (“For contributory liability to attach, the final Diversey prong requires a defendant to “cause” or “materially contribute to” third-parties’ direct infringement.”); See *id.* at 1286 (“[F]ederal courts have long recognized and applied theories of secondary liability . . .”).

268. RICHARD J. STARK & ANDREI HARASYMIK, RECENT TRENDS IN PATENT INFRINGEMENT LAWSUITS 1 (2011 ed., 2011).

269. *Id.*

270. Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd., 545 U.S. 913, 918–19 (2005).

271. *Id.* at 936 (quoting Oak Indus., Inc., v. Zenith Elecs. Corp., 697 F. Supp. 988, 992 (N.D. Ill. 1988)).

272. *Id.* at 932.

273. Ellison v. Robertson, 357 F.3d 1072, 1076 (9th Cir. 2004).

274. *Id.* (citation omitted).

275. *Id.* at 1077, 1080.

276. *Id.*

277. *Grokster*, 545 U.S. at 936.

278. *Id.* at 936–37.

Advertising an infringing use or instructing how to engage in infringement are also affirmative steps that encourage copyright infringement.²⁷⁹

Both Congress²⁸⁰ and courts²⁸¹ assign liability to an actor who induces infringement by a third party. In *Global-Tech Appliances, Inc. v. SEB S.A.*, the defendant hired a third party to copy the plaintiff's patented deep fryer.²⁸² The Supreme Court ruled "a party who 'actively induces infringement' of a patent' under 35 U.S.C. § 271(b) must *know* that the induced acts constitute patent infringement" (emphasis added).²⁸³ The defendant was held liable for the third parties' direct infringement.²⁸⁴ Knowledge of infringement was found because the defendant's CEO conducted extensive market research, knew how to easily identify registered patents, and told the third party to copy the patented product.²⁸⁵

In an induced infringement suit for a patent, the plaintiff must prove the inducer "took an affirmative act to encourage infringement."²⁸⁶ Examples of affirmative steps are, providing instruction manuals for using components in an infringing manner²⁸⁷ or supplying machinery and tool sets with the express intention of aiding another entity in patent infringement.²⁸⁸

In addition to both requiring knowledge, direct infringement, and affirmative acts,²⁸⁹ cases of contributory infringement of copyrights and patents impute knowledge through willful blindness.²⁹⁰ Willful blindness requires, "(1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact."²⁹¹ Willful blindness differs from recklessness where a defendant need only know of a substantial and unjustified risk of wrongdoing, and it differs

279. *VHT, Inc. v. Zillow Grp., Inc.*, 918 F.3d 723, 745–46 (9th Cir. 2019) (quoting *Grokster*, 545 U.S. at 936).

280. See 35 U.S.C. § 271(b) ("Whoever actively induces infringement of a patent shall be liable as an infringer.").

281. See DONALD S. CHISUM, CHISUM ON PATENTS § 17.04 (2023) (detailing the history of how courts apply 35 U.S.C. § 217(b)).

282. *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 757–58 (2011).

283. *Id.* at 757; see also *id.* at 766 ("[W]e now hold that induced infringement under § 271(b) requires knowledge that the induced acts constitutes patent infringement.").

284. *Id.* at 771.

285. *Id.* at 770–71.

286. *Automatic Equip. Mfg. Co. v. Danko Mfg., LLC*, 582 F. Supp. 3d 649, 665 (D. Neb. 2022) (quoting *Power Integrations, Inc. v. Fairchild Semiconductor Int'l, Inc.*, 843 F.3d 1315, 1332 (Fed. Cir. 2016)).

287. See *Microsoft Corp. v. SynKloud Techs., LLC*, 484 F. Supp. 3d 171, 185 (D. Del. 2000) ("An accusation would suggest such encouragement if, for example . . . the indirect infringer was asserted to have provided the direct infringer with 'instruction manuals . . .'" (citation omitted)).

288. See *Five Star Gourmet Foods, Inc. v. Fresh Express, Inc.*, No. 19-cv-05611-PJH, 2020 U.S. Dist. LEXIS 46205, at *1, *20–21 (N.D. Cal. Mar. 16, 2020) ("[D]efendant may have committed affirmative acts by supplying machinery and tool sets . . . but, without factual allegations of knowledge . . . plaintiffs have simply demonstrated that defendant was carrying on normal business activities.").

289. *Id.* at *17; *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004).

290. See *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 768 (2011); ("[W]e can see no reason why [the willful blindness] doctrine should not apply in civil lawsuits for induced patent infringement."); see also *Luvdarts, LLC v. AT&T Mobility, LLC*, 710 F.3d 1068, 1073 (9th Cir. 2013) ("Willful blindness of specific facts would establish knowledge for contributory [copyright] liability.") (citing *In re Aimster Copyright Litig.*, 334 F.3d 643, 650 (7th Cir. 2003)).

291. *Global-Tech*, 563 U.S. at 769 (footnote omitted).

from negligence where a defendant should have known of a risk but did not recognize it.²⁹²

In summary, vicarious liability is assigned to defendants who induce infringement of intellectual property by a third party when (1) infringement occurs, (2) the defendant takes active steps or makes an affirmative action that encourages infringement, and (3) the defendant has knowledge of direct infringement.²⁹³ Knowledge is assigned when the defendant (1) has actual knowledge infringement will occur, (2) should know the direct infringement is likely to occur, or (3) is willfully blind.²⁹⁴

2. *Influencers and Copyright Infringement*

While this note is focused on holding influencers liable for their followers' actions, copyright owners have tried to hold advertisers liable for the actions of influencers.²⁹⁵ In *Umg Recordings, Inc.*, owners of copyrighted music brought infringement suits against Bang Energy who used plaintiff's music in its advertisements.²⁹⁶ Interestingly, "Bang uses only social media and experiential events for marketing."²⁹⁷ Part of Bang's social media marketing included paying influencers to post on various social media websites.²⁹⁸ The influencers' posts, owned by Bang via agreement, used plaintiff's copyrighted music.²⁹⁹ Plaintiff's contributory and vicarious infringement theories were based upon the influencers being direct infringers.³⁰⁰ The court denied plaintiffs motion for summary judgment as to their contributory infringement claim because "Bang [had] introduced evidence that Defendants have no part in the production of third-party influencer videos and do not select or have any input regarding the selection of music."³⁰¹ With respect to the vicarious infringement claim, the court found the "control" element was met because Bang "had the right to stop or limit the infringement by refusing to approve videos and refusing to pay the

292. *Id.* at 769–70.

293. *See Fresh Express*, 2020 U.S. Dist. LEXIS 46205, at *17 ("[P]laintiffs must demonstrate that: '(1) a third party directly infringed . . . (2) [defendant] induced those infringing acts; and (3) [defendant] knew the acts it induced constituted infringement.'" (quoting *Power Integrations, Inc. v. Fairchild Semiconductor Int'l, Inc.*, 843 F.3d 1315, 1332 (Fed. Cir. 2016)).

294. *See Ellison*, 357 F.3d at 1076 ("We have interpreted the knowledge requirement for contributory copyright infringement to include both those with actual knowledge and those who have reason to know of direct infringement."); *See Global-Tech*, 563 U.S. at 769 ("Given the long history of willful blindness and its wide acceptance in the Federal Judiciary, we can see no reason why the doctrine should not apply in civil lawsuits for induced patent infringement under 35 U.S.C. § 271(b).").

295. *See UMG Recordings v. Vital Pharms., Inc.*, No. 21-cv-60914-CIV-DIMITROULEAS/SNOW, 2022 U.S. Dist. Lexis 241138, at *5, *12–13 (S.D. Fla. Jul. 11, 2022) ("Plaintiffs also asserted claims for contributory and/or vicarious infringement against Bang based on the videos posted by the Bang Influencers on their personal TikTok accounts.").

296. *Id.*

297. *Id.* at *4–5.

298. *Id.*

299. *Id.*

300. *Id.* at *12–13.

301. *Id.* at *20.

Bang Influencers.”³⁰² However, the plaintiffs failed to show that Bang “received direct financial benefit from the Influencer Videos.”³⁰³

Umg is illustrative in why induced infringement is most applicable to influencers. “One infringes vicariously by profiting from direct infringement while declining to exercise a right to stop or limit it.”³⁰⁴ If Bang investing in influencers to advertise was not enough to show “profit” then it would be challenging to apply a vicarious infringement theory to an Influencer-Follower relationship because one would need to prove the Influencer made financial gain via the follower’s actions.³⁰⁵ However, “[o]ne infringes contributorily by intentionally inducing or encouraging direct infringement.”³⁰⁶ Had Bang made music decisions it may have been liable,³⁰⁷ just as influencers should be liable if they direct others to engage in tortious conduct.

3. *Can Influencers be Held Liable for Inducement of Torts Using Intellectual Property methods?*

Considering the three elements of induced infringement above,³⁰⁸ I will analyze if, and how effective, they can be in assigning liability to influencers who induce other torts. For ease, “infringement” will be replaced with any tort because the essence of induced infringement, holding those who are morally responsible legally liable for harms they encouraged, mirrors the aims of tort law.³⁰⁹

The elements for induced tort applied to influencers under this framework would be (1) a tort occurs, (2) the influencer takes active steps or makes an affirmative action to encourage the tort, and (3) the influencer has knowledge of the tort.³¹⁰

302. *Id.* at *23.

303. *Id.* at *25.

304. *Id.* at *20 (quoting *Metro-Goldwyn-Mayer Stud. Inc v. Grokster, Ltd.*, 545 U.S. 913, 930 (2005)).

305. *See id.* at *23 (“The second element of a vicarious infringement claim is direct financial benefit. For purposes of vicarious liability, a financial benefit does not have to be ‘substantial.’”).

306. *Id.* at *18 (quoting *Grokster*, 545 U.S. at 930).

307. *See id.* at *20–21 (“Bang can be liable even if the Bang Influencers produced the videos and selected the music.”).

308. *See Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004) (“We have interpreted the knowledge requirement for contributory copyright infringement to include both those with actual knowledge and those who have reason to know of direct infringement.”); *See Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769 (2011) (“Given the long history of willful blindness and its wide acceptance in the Federal Judiciary, we can see no reason why the doctrine should not apply in civil lawsuits for induced patent infringement under 35 U.S.C. § 271(b).”); *See Five Star Gourmet Foods, Inc. v. Fresh Express, Inc.*, No. 19-cv-05611-PJH, 2020 U.S. Dist. LEXIS 46205, *17 (N.D. Cal. Mar. 16, 2020) (“[P]laintiffs must demonstrate that: ‘(1) a third party directly infringed . . . (2) [defendant] induced those infringing acts; and (3) [defendant] knew the acts it induced constituted infringement.’”) (quoting *Power Integrations, Inc. v. Fairchild Semiconductor Int’l, Inc.*, 843 F.3d 1315, 1332 (Fed. Cir. 2016)).

309. *See STARK & HARASYMIK*, *supra* note 268 at 14 (“The inducement doctrine reflects the basic moral and legal principle that those who assist bad acts by others should be liable for those acts.”); *SPEISER ET AL.*, *supra* note 107.

310. *See Ellison*, 357 F.3d at 1076 (“We have interpreted the knowledge requirement for contributory copyright infringement to include both those with actual knowledge and those who have reason to know of direct

To apply a familiar example, I will use the torts committed by Cenat's fans³¹¹ at the Union Square Park Riot.³¹² The first element is easily met as there were several torts committed by fans who showed up to the giveaway.³¹³ Police made 65 arrests, including 30 juveniles.³¹⁴ Specifically, teenagers damaged cars, a 17-year-old was injured by a firework, construction sites were damaged, and businesses were destroyed.³¹⁵

Whether Cenat took affirmative acts to *encourage* the tort is a necessary element under the influencer inducement test.³¹⁶ Examples of affirmative acts in patent and copyright induced infringement cases are advertising an infringing use, instructing on how to engage in infringement,³¹⁷ providing instructions on how to infringe,³¹⁸ and supplying a product used to infringe while profiting.³¹⁹ Cenat did affirmatively advertise his giveaway and encouraged fans to show up in numbers.³²⁰ However, under the influencer inducement test, his advertisement would need to advertise a tort, and he was only advertising a giveaway to reward his loyal fans for their continued support.³²¹ His advertising does not reach the same level of encouragement as the above examples where the inducer's desired or expected result was infringement.³²²

Although Cenat does not meet the affirmative action element,³²³ I still want to address his knowledge of the torts committed by his fans. Knowledge is assigned to the influencer under this framework when they (1) have actual knowledge a tort will occur, (2) should know the tort is likely to occur, or (3) are willfully blind.³²⁴ Proving actual knowledge is unpracticable because it would require Cenat "had knowledge or awareness of any specific" tort likely to occur.³²⁵ Willful blindness is also inapplicable because it would require Cenat purposefully avoided learning that his followers were committing torts.³²⁶

infringement."); *See Global-Tech* 563 U.S. at 769 ("Given the long history of willful blindness and its wide acceptance in the Federal Judiciary, we can see no reason why the doctrine should not apply in civil lawsuits for induced patent infringement under 35 U.S.C. § 271(b).").

311. *See* Marcius & Cramer, *supra* note 3 ("Fans of Mr. Cenat . . . toppled trash cans or threw objects at police officers.").

312. *See* Sottile & Morales, *supra* note 1 ("Social media influencer Kai Cenat has been charged with inciting a riot and unlawful assembly after thousands-strong crowds gathered in Union Square in New York City . . .").

313. Marcius & Cramer, *supra* note 3.

314. CBS Miami Team, *Twitch Streamer Kai Cenat Charged with Inciting Riot During Playstation Giveaway*, CBS (Aug. 5, 2023), <https://www.cbsnews.com/miami/news/kai-cenat-to-face-charges-after-chaos-breaks-out-at-nyc-giveaway-nypd-chief-says/> [<https://perma.cc/8V6T-TRLD>].

315. *Id.*

316. *Metro-Goldwyn-Mayer Stud. Inc v. Grokster, Ltd.*, 545 U.S. 913, 919 (2005).

317. *VHT, Inc. v. Zillow Grp., Inc.*, 918 F.3d 723, 745 (9th Cir. 2019).

318. *Microsoft Corp. v. SynKloud Techs., LLC*, 484 F. Supp. 3d 171, 171 (D. Del. 2000).

319. *Grokster*, 545 U.S. at 915–16.

320. Sottile & Morales, *supra* note 1.

321. *Grokster*, 545 U.S. at 918–19.

322. *Supra* Parts III.B.1–3 notes 167–88.

323. *See Grokster*, 545 U.S. at 915-916 (discussing the need to show affirmative intent that infringement occurs).

324. *See supra* Part III.C.1 (discussing the elements for induced infringement in intellectual property cases).

325. *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 41 (2d Cir. 2012).

326. *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769 (2011).

Should Cenat have known torts were likely to occur? After all, another member of his group did raise security concerns on stream prior to the giveaway.³²⁷ Those concerns could have referred to Cenat's personal safety rather than general safety of holding such an event.³²⁸ According to fellow influencer JiDion, Cenat should have known the risks associated with the giveaway.³²⁹ Knowing the risks is different than knowing the harm associated with the risks are likely to occur.³³⁰ For Cenat, he should have, and possibly did, know the risks associated with holding a massive giveaway, such as crushes.³³¹ However, suggesting he should have known specific instances of torts would occur requires him to be aware of risks of specific torts that would be committed.³³² For example, while he could have predicted a crush would occur,³³³ it would be unreasonable to burden him with foreseeing fans setting off fireworks, trespassing on a construction site, and intentionally damaging property. This does not mean the influence inducement framework would be unsuccessful in other situations where an influencer issues a call-to-action and expects their followers to comply.³³⁴

D. Promotional and Product liability

Courts often acknowledge that foreseeable injury or death arising from a broadcaster's promotion is grounds for vicarious liability.³³⁵ In *Weirum v. RKO*, a radio station with a large teenage audience promoted a contest which awarded the first person to locate a hidden disc jockey.³³⁶ Two minors, attempting to win the contest, raced to locate the DJ, but one of their cars negligently forced another off the highway, killing the driver—raising the question of whether the radio station owed a duty to the deceased driver because of its broadcasted giveaway.³³⁷ The court held the radio station liable for the driver's death because of the station's "creation of an unreasonable risk of harm."³³⁸ The court highlighted the station's command of a plurality of the teenage audience in Los Angeles, the promise of a \$40,000 award, and its knowledge of dangerous driving.³³⁹

327. Marcus & Cramer, *supra* note 3.

328. *See generally id.* (discussing the security concerns raised by Cenat's team).

329. @JiDionPremium, *supra* note 239.

330. *See Global-Tech*, 563 U.S. at 769 (discussing the doctrine of willful blindness and discussing specifically knowing that a fact exists).

331. *See Tracy Hresko Pearl, Crowd Crush: How the Law Leaves American Crowds Unprotected*, 104 KENTUCKY L.J. 1, 1 (2015) ("Crowd-related injuries and deaths are startling common both in the United States and worldwide.").

332. *Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 41 (2d Cir. 2012).

333. *See Pearl, supra* note 331 (discussing the commonality of crowd crushes in the US).

334. *See Weirum v. RKO Gen., Inc.*, 15 Cal. 3d 40, 49 (1975) (discussing a different framework for evaluation).

335. *Id.*

336. *Id.* at 43.

337. *Id.* at 45.

338. *Id.* at 49.

339. *Id.*

The liability of radio stations who sponsor promotions is not unlimited.³⁴⁰ In *Magee v. Landers*, the plaintiff was injured by a drunk driver who attended a “Bar Party” cosponsored by the defendants: a radio station and tavern owner.³⁴¹ The court answered no to the question of “whether strict liability under the Dram Shop Act may be extended to [the radio station] as a nonseller of the alcoholic beverages.”³⁴² The radio station was not liable for the drunk driver’s negligence because “alcoholic beverages were dispensed solely by the tavern . . . [t]he radio station had no say as to whom should be served, or how often” and the radio station “did not ‘unlawfully assist in procuring liquor’ for any patron of the tavern.”³⁴³ Similarly the court in *Santodonato v. Clear Station* found, “[e]ven assuming that [defendant-radio station’s] misrepresentations facilitated decedent’s presence at defendant’s radio station, plaintiff has nonetheless failed to adduce any proof concerning the actual cause of decedent’s fall.”³⁴⁴ These cases suggest that, like respondeat superior there is a control element necessary for promotional liability that was absent in *Weirum*.³⁴⁵

A more recent example of courts using product liability to hold a defendant liable for a plaintiff’s injury caused by a third party is *Soto v. Bushmaster Firearms International*.³⁴⁶ Rooted in a state law that “does not permit advertisements that promote or encourage violent, criminal behavior,” the Connecticut Supreme Court found a firearms manufacturer liable for injuries caused by a consumer who used its weapon in a mass shooting.³⁴⁷ Although the firearm was legal, the plaintiff’s alleged it was marketed by “extolling the militaristic and assaultive qualities of the [weapon],” using images of soldiers and military performances.³⁴⁸ Rather than being marketed by promoting civilian purposes such as hunting and shooting, the defendant’s product catalogue highlighted its use as a combat weapon.³⁴⁹ Assigning liability to marketers occurs “when companies have advertised or promoted their products in a manner that is likely to result in physical injury.”³⁵⁰ For example, companies cannot advertise toys meant for children to be used in unsafe or unlawful manners.³⁵¹

As with radio promotions, product liability is not unlimited.³⁵² In *Winter v. G.P. Putnam’s Sons*, the plaintiffs brought suit against a book publisher after

340. See *Magee v. Landers*, 122 Misc. 2d 736, 738 (Onodaga County S. Ct. 1984) (discussing liability of a radio station and how it is lessened by other mitigating factors).

341. *Id.* at 736.

342. *Id.* at 738.

343. *Id.* at 738–39.

344. *Santodonato v. Clear Channel Broadcasting, Inc.*, 26 A.D.3d 543, 545 (N.Y. App. Div. 2006); see also *Benaquista v. Municipal Hous. Auth.*, 212 A.D.2d 860, 861 (N.Y. App. Div. 1995) (finding no liability when defendant’s act “merely furnished the condition or occasion upon which [a] plaintiff’s injuries were received”).

345. *Santodonato*, 26 A.D. 32; *Benaquista*, 212 A.D.; *Weirum v. RKO Gen., Inc.*, 15 Cal. 3d 40, 49 (1975).

346. *Soto v. Bushmaster Firearms Int’l, LLC*, 202 A.3d 262, 272 (Conn. 2019).

347. *Id.* at 272.

348. *Id.* at 277.

349. See *id.* (“Consistent with that image, the defendants further promoted the XM15-E2S as a combat weapon . . . which, the plaintiffs allege, differs from how the defendants promote and sell rifles for legal civilian purposes such as hunting and sport shooting).

350. *Id.* at 299.

351. *Id.*

352. See *Winter v. G.P. Putnam’s Sons*, 938 F.2d 1033, 1036 (9th Cir. 1991) (discussing limits to product liability as it extends to a book publisher).

becoming “severely ill from picking and eating mushrooms after relying on information in *The Encyclopedia of Mushrooms*, a book published by defendant.”³⁵³ According to the Ninth Circuit, products liability law does not expand to “ideas and expression in a book.”³⁵⁴ Expanding products liability to ideas could deprive the world of the “latest ideas and theories.”³⁵⁵ The court distinguished books of pure thought and expression from physical products like aeronautical charts which are “graphic depictions of technical, mechanical data.”³⁵⁶ The Sixth Circuit followed the Ninth Circuit’s protection of media from product liability laws in *James v. Meow Media*.³⁵⁷ In *Meow*, the parents of a school shooting victim brought suit against video game, movie production, and internet content-provider firms.³⁵⁸ The plaintiffs asserted that “video game cartridges, movie cassettes, and internet transmissions” were “products” for the purposes of product liability law.³⁵⁹ The court found video game cartridges, movie cassettes, and internet transmissions “are not sufficiently ‘tangible’ to constitute products in the sense of their communicative content.”³⁶⁰

1. *Assigning Liability to Influencers via Promotional and Product Liability*

The promotional power of influencers has long been recognized by advertisers.³⁶¹ Before assigning liability to promoters, courts generally require three elements: (1) there was a promotion, (2) that created an unreasonable risk, and (3) injury was likely to result from the risk.³⁶²

Because influencers are frequently hired by third-party agencies to promote third-party products,³⁶³ assigning liability to them as the spokesperson would be a stretch, so this note will focus on the promotions. Applying the same standards to an influencer would require the influencer (1) promoted an event, (2) the event created an unreasonable risk, and (3) injury was likely to result from the risk.³⁶⁴

The first prong is easily met in most cases where a tort victim was injured by a follower who attended a promoted event, such as the Cenat Riot,³⁶⁵ or where an influencer’s call to action promoted risky actions, such as Marsh’s call to

353. *Id.* at 1033.

354. *Id.* at 1036.

355. *Id.* at 1035.

356. *Id.* at 1036.

357. *See James v. Meow Media, Inc.*, 300 F.3d 683, 701 (6th Cir. 2002) (citing *Winter v. G.P. Putnam’s Sons*, 938 F.2d 1033, 1036 (9th Cir. 1991)).

358. *Id.* at 687.

359. *Id.* at 688.

360. *Id.* at 701.

361. Harris, *supra* note 29.

362. *See infra* Part III.C (detailing examples of advertisement and promotional liabilities).

363. Joel Mathew, *Understanding Influencer Marketing and Why It Is So Effective*, FORBES (Apr. 14, 2022), <https://www.forbes.com/sites/theyec/2018/07/30/understanding-influencer-marketing-and-why-it-is-so-effective/> [<https://perma.cc/6FVZ-DNBS>].

364. *See infra* Part III.C (detailing examples of advertisement and promotional liabilities).

365. Sottile & Morales, *supra* note 1.

action.³⁶⁶ It is not unusual for influencers to promote in-person events such as meetups or appearances at conventions.³⁶⁷

The second prong, whether the event created an unreasonable risk, is trickier. While certain promotions, like that in *Weirum*, create readily identified unreasonable risks like teenagers driving wildly through the city,³⁶⁸ others do not. For example, at first glance, Cenat's Riot shares many similarities with *Weirum*.³⁶⁹ Both had a large teen audience and were offering giveaways with substantial monetary value.³⁷⁰ However, Cenat did not promote anything more than a gathering where he would hand out giveaways.³⁷¹ In *Weirum*, followers hoping to reap the reward of the promotion were prompted to go on a wild goose hunt to find a DJ first.³⁷² *Weirum*'s promotion created the unreasonable risk not by doing a giveaway, but by enticing followers to break traffic laws and recklessly drive to be the first.³⁷³ Cenat on the other hand, just asked his followers to show up in a specific location at a specific time.³⁷⁴ From a promotional point of view, Cenat did nothing more than give followers a time and place to be.³⁷⁵ There was no expectation of Cenat's followers to engage in any risky behavior to get their reward.³⁷⁶ To assign liability to Cenat under this framework,³⁷⁷ it must have been an unreasonable to risk to have his fans show up in the park for a free giveaway. While having hundreds of young fans show up for a giveaway turning into a mass tort event is possibly foreseeable, as JiDion noted,³⁷⁸ whether it was unreasonable is debatable. Compared to children using razor blades³⁷⁹ or cooking without adult supervision,³⁸⁰ asking fans, albeit mostly teenage boys, to show up for a giveaway does not have the same inherent risk of physical injury. Thus, to satisfy the second prong of this influencer framework,³⁸¹ courts would need to find mass gatherings with the promise of free computers, gaming equipment, and the like creates an unreasonable risk for the attendees subsequently starting a riot.

If the second prong, creation of an unreasonable risk, is met, then satisfying the third prong is easy.³⁸² As long as the injury results from the creation of the

366. Florio, *supra* note 78.

367. *Influencer Marketing Events to Attend in 2023–2024*, IZEA (Oct. 24, 2023), <https://web.archive.org/web/20240308211735/https://izea.com/resources/influencer-marketing-events/> [<https://perma.cc/JJ5B-3NPA>].

368. *Weirum v. RKO Gen., Inc.*, 15 Cal. 3d 40, 48 (1975).

369. Sottile & Morales, *supra* note 1.

370. *Id.*; *Weirum*, 15 Cal. 3d at 44.

371. Marcus & Cramer, *supra* note 3.

372. *Weirum*, 15 Cal. 3d at 44.

373. *Id.* at 48.

374. Marcus & Cramer, *supra* note 3.

375. *Id.*

376. *Id.*

377. *See supra*, Part III.A-C (detailing examples of advertisement and promotional liabilities).

378. @JiDionPremium, *supra* note 239.

379. *F.T.C. Acts to Bar Razor Blade Ads*, N.Y. TIMES (Mar. 13, 1971), <https://www.nytimes.com/1971/03/13/archives/ftc-acts-to-bar-razor-blade-ads-says-newspaper-samples-have-injured.html> [<https://perma.cc/SS2Y-52GA>].

380. *In re Uncle Ben's, Inc.*, 89 F.T.C. 131, 136 (1977).

381. *Supra* Parts III.A–C.

382. *Id.*

unreasonable risk, an influencer can be held liable.³⁸³ For Cenat, if his giveaway created an unreasonable risk of rioting, then deciding what injury was likely to result from such a riot is simple. Damage to cars, property, businesses, and persons are all likely to result from a riot.³⁸⁴ However, if large in person giveaways create unreasonable risks associated with large crowds, such as crushes,³⁸⁵ then when injuries go beyond to those seen with rioting, this influencer promotion framework would preclude Cenat from liability.

Product liability would be unsuccessful in assigning liability to influencers.³⁸⁶ Copyrightable content is typically not included in product liability laws.³⁸⁷ Social media users own the copyright in their content.³⁸⁸ As the *Winter* court explained, product liability is concerned with “tangible” products that can cause injury when defective or due to a malfunction.³⁸⁹ Even if an influencer promotes false or dangerous narratives presented as facts, the posts are not a “physical ‘product’” and are instead “pure thought and expression.”³⁹⁰

IV. RECOMMENDATION

Before detailing how the principles and elements of respondeat superior, induced infringement, and promotional liability can be combined to form an Influencer Liability Framework, the primary aims of tort law should be reiterated. The primary purpose of tort law is to “[compensate] plaintiffs for the injuries they have suffered wrongfully at the hands of others.”³⁹¹ Tort law seeks to encourage reasonable conduct and equally discourage conduct that creates an

383. *Id.*

384. *See Riot*, ENCYCLOPAEDIA BRITANNICA (Sept. 7, 2024), <https://www.britannica.com/topic/riot> [<https://perma.cc/Q5XF-XDEF>]; Harmeet Kaur, *This is the Damage Rioters Caused to the Capitol Building*, CNN (Jan. 7, 2021, 12:24 PM), <https://www.cnn.com/2021/01/07/us/rioters-capitol-building-damage-photos-trnd/index.html> [<https://perma.cc/6BVL-2KRN>].

385. Tara Parker-Pope, *How to Survive a Crowd Crush and Why they Can Become Deadly*, WASHINGTON POST (Oct. 31, 2022), <https://www.washingtonpost.com/wellness/2022/10/31/seoul-crowd-crush-how-to-survive/> [<https://perma.cc/4PD9-YJRJ>].

386. *See, e.g.*, William A. Dreier, *A Question of Liability: Who’s to Blame When Products Developed by Licensees Cause Unforeseen...?*, NORRIS McLAUGHLIN (Apr. 3, 2000), <https://norrismclaughlin.com/articles/a-question-of-liability-whos-to-blame-when-products-developed-by-licensees-cause-unforeseen/> [<https://perma.cc/4XNE-AQUU>] (discussing how merely endorsing or advertising a product does not meet the threshold for liability).

387. *See, e.g.*, *James v. Meow Media, Inc.*, 300 F.3d 683, 701 (6th Cir. 2002) (holding that “‘words and pictures’ contained in a board game,” as well as the contents of videogames by extension, do not constitute “products” for purposes of strict liability).

388. *See Whiddon v. BuzzFeed, Inc.*, 638 F. Supp. 3d 342, 350–56 (S.D.N.Y. 2022) (finding Instagram user is the owner of copyright in her posts because it meets the fixation, creativity, and tangible medium requirements of copyright protection); *see also Group Registration for Short Online Literary Works (GRTX)*, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/grtx/> [<https://perma.cc/RW3E-6632>] (“The Copyright Office has implemented a new group registration option for short online literary works such as blog entries, social media posts, and short online articles.”).

389. *See Winter v. G.P. Putnam’s Sons*, 938 F.2d 1033, 1036 (9th Cir. 1991) (“Under products liability law, strict liability is imposed on the theory that ‘the costs of damaging events due to defectively dangerous products can best be borne by the enterprisers who make and sell these products.’”).

390. *See id.* at 1036 (“*The Encyclopedia of Mushrooms* is like a book on how to use a compass or an aeronautical chart. The chart itself is like a physical “product” while the “How to Use” book is pure thought and expression Given these considerations, we decline to expand products liability law to embrace the ideas and expression in a book.”).

391. SPEISER ET AL., *supra* note 107.

unreasonable risk of injury to others.³⁹² Like criminal law, tort law also acts as a social control due to public punishment.³⁹³

To satisfy the aims of tort law, a vicarious liability framework for influencers must encourage influencers to act reasonably while equally discouraging them from creating unreasonable risks of injury. Additionally, the elements necessary to hold influencers liable must be broad enough to compensate victims injured at the hands of their followers while narrow enough to avoid holding influencers liable for acts so far removed from their influence on a viewer that it would be unfair to punish the influencer.

This note recommends combining aspects of respondeat superior, induced infringement, and promotional/product liability to carefully tailor elements that hold influencers liable for harms caused by unreasonable risks that are foreseeable. From respondeat superior, the motivation test³⁹⁴ fits seamlessly into an influencer situation because it establishes the causal link between an influencer-follower relationship and the follower's actions. It accounts for scenarios where a viewer is motivated to serve the interests of an influencer, as in the Marsh situation,³⁹⁵ as well as mixed motive scenarios where a follower can serve personal and influencer interests. To assess this prong courts can ask whether "the [follower] is acting from personal motives having no relationship to the [influencer.]"³⁹⁶ If that inquiry is challenging, and multiple motives are present, courts should weigh whether the wrongdoing "further[ed] the interests of the [influencer.]"³⁹⁷ While effective for establishing the link between an influencer and their follower's wrongdoings, stopping here would fail to delineate between rogue unpredictable followers and those who commit reasonably foreseeable actions. Hence the applicability of foreseeability.

Foreseeability is a factor in respondeat superior³⁹⁸ and induced infringement.³⁹⁹ Thus, to avoid unreasonably holding influencers liable for unpredictable torts, it must be foreseeable to an influencer that a tort would occur. For example, if an influencer says they do not like the taste of a restaurant's French fries, it would be incredibly unfair to hold that influencer liable for a follower's subsequent arson of the restaurant. While technically motivated to serve only the influencer's interests,⁴⁰⁰ saving their tastebuds,

392. *Id.*

393. *Id.*

394. *See supra* Part III.B.1 (discussing respondeat superior and the motivation test).

395. Florio, *supra* note 78.

396. *See* Hendley v. Springhill Mem'l Hosp., 575 So. 2d 547, 550 (Ala. 1990) ("A tort committed by an agent, even if committed while engaged in the employment of the principal, is not attributable to the principal if it emanated from wholly personal motives of the agent and was committed to gratify wholly personal objectives or desires of the agent." If that inquiry is challenging, and multiple motives are present, courts should weigh whether the wrongdoing furthered the interests of the influencer).

397. *Grimes v. B.F. Saul Co.*, 47 F.2d 409, 410 (D.C. Cir. 1931) ("The agent is not then acting within the scope of his authority in the business of the principal, but in the furtherance of his own ends. . . . The general idea is that the employee at the time of doing the wrongful act, in order to fix liability on the employer, must have been acting on behalf of the latter and not on his own account.").

398. *See supra* Part II.A.4 (discussing foreseeability in respondeat superior).

399. *Supra* Part II.B. (stating infringement is foreseeable because defendants take affirmative actions to encourage infringement they know will occur).

400. *Berry v. Com. Ins. Co.*, 175 N.E.3d 383, 389 (Mass. 2021).

common sense shows the influencer should not be liable for the damages caused. To incorporate this common sense into an Influencer Liability Framework, the action prongs in infringement and promotional liability come into play.

Under induced infringement, a defendant must take active steps or an affirmative action that encourages infringement.⁴⁰¹ Under promotional liability, there must be an actual promotion.⁴⁰² Applied to an Influencer Liability Framework, the influencer must make an actual call to action or make affirmative acts that encourage a tort.⁴⁰³ This affirmative step element avoids the above hypothetical where an influencer is held liable for something tangentially related to their actions. However, it rightly holds influencers liable who make calls to action to their followers or actively induce their wrongdoings by providing instructions to followers⁴⁰⁴ or supplying followers with tools likely to cause harm.⁴⁰⁵

The last bump in the road for holding influencers liable for their follower's actions is whether the risk created by the influencers affirmative act was unreasonable.⁴⁰⁶ Everything comes with a risk. An influencer who tells their followers it is healthy to exercise creates a foreseeable risk that inexperienced viewers will go to public gyms, exercise, and cause property damage due to their inexperience with machines or gym equipment. But that risk is not unreasonable, and it would be unfair to lengthen the causal chain all the way to that influencer's affirmative call to action for their followers to exercise. So, there must be a reasonableness requirement to an Influencer Liability Framework. Only when an influencer creates an unreasonable risk through their affirmative acts, as Marsh did by doxing Shumirun,⁴⁰⁷ should they be held liable for the harm caused by those unreasonable risks.

In sum, an Influencer Liability Framework would hold influencers liable for harms caused by their followers when the influencer (1) made an affirmative action or took affirmative steps to encourage an act that (2) created an unreasonable risk, and the follower (1) was motivated to serve the interests of the influencer and (2) caused harm that was foreseeable due to the unreasonable risk created.⁴⁰⁸

The Influencer Liability Framework encourages influencers to act reasonably because they can be held liable for their own acts even when the actual harm is caused by another.⁴⁰⁹ Influencers cannot hide behind a "some other guy did it" excuse. It also discourages influencers from creating unreasonable risk of injury because they will be more careful in their calls to

401. See *supra* note 293 and accompanying text (discussing the elements for induced infringement in intellectual property cases).

402. *Soto v. Bushmaster Firearms Int'l, LLC*, 202 A.3d 262, 299 (Conn. 2019).

403. *Supra* Part III.B.

404. *Weirum v. RKO Gen., Inc.*, 15 Cal. 3d 40, 44 (1975).

405. *Five Star Gourmet Foods, Inc. v. Fresh Express, Inc.*, No. 19-cv-05611-PJH, 2020 U.S. Dist. LEXIS 46205, at *1, *20–21 (N.D. Cal. Mar. 16, 2020).

406. Speiser, *supra* note 107.

407. Florio, *supra* note 78.

408. *Supra* Parts III.A–D.

409. *Supra* Part III.B.5.

action or when speaking in hyperbole.⁴¹⁰ In essence, it tells influencers to look before they leap. Before doxing and harassing or setting up an impromptu event, influencers will need to stop and assess whether they are creating unreasonable risks of injury.⁴¹¹ Lastly, it provides a reasonable avenue for victims to be compensated when their attackers are judgement proof without unfairly assigning fault to influencers whose acts were merely tangential to the harm caused.⁴¹²

V. CONCLUSION

In an ever-increasing online world, courts should be flexible in assigning blame to those behind a screen. With the rise of influencers and the potential for their acts to have harmful downstream impacts,⁴¹³ courts must prepare for an influx of defendants who claim, “my favorite influencer told me to.” Influencers’ online actions increasingly result in real life harm,⁴¹⁴ but with so many followers being young and potentially judgment proof, going after the head of the snake should be an option. The Influencer Liability Framework presented above fairly holds influencers liable when their followers, motivated by the influencer, cause harm without unduly burdening influencers through the foreseeability and unreasonable risk requirements. Grounded in fairness, the Influencer Liability Framework would dissuade influencers from acting recklessly while encouraging them to act with appropriate caution. With great power comes great responsibility,⁴¹⁵ and influencers are no exception. With their immense power⁴¹⁶ comes an equally immense responsibility to foresee the risks they create and mitigate their potential to motivate followers to do harm.

410. See Alexandra J. Roberts, *False Influencing*, 109 GEO. L.J. 81, 110–114 (2020) (discussing the misleading and irresponsible statements used by influencers for marketing).

411. Speiser, *supra* note 107.

412. *Supra* Part III.B.

413. See, e.g., Elizabeth Porter, *Are Influencers Making a Bad Impression?: Exploring the Consumer Harm of the Influencer Marketing Economy*, 5 CORP. & BUS. L.J. 248 (2024) (discussing negative impact of influencer marketing).

414. *Id.*

415. Ilya Somin, *What Constitutional Lawyers Can Learn from Spiderman*, REASON.COM (Nov. 16, 2018, 7:16 PM), <https://reason.com/volokh/2018/11/16/what-constitutional-lawyers-can-learn-fr/> [<https://perma.cc/6KQZ-2XT4>].

416. *Id.*