

## **Written Testimony of Kayla Moran**

### **Streaming Success: Small Businesses in the Age of Digital Influence**

#### **Introduction**

The story of American entrepreneurship is changing. Today, the storefronts of Main Street have moved online. The creator economy, with its low barriers to entry and flexibility, opens new career paths for Americans. What started in its early years with bloggers, has evolved into an unique and uncharted industry where marketing agencies now hire social media influencers to reach new audiences. With this shift, the creator economy has effectively disrupted traditional and costly multi-million dollar marketing productions.

Content creation and influencing has become a potentially lucrative career path for many people, and now creators need Congressional backed support and protection to navigate the industry as it continues to rapidly grow into a multi billion-dollar segment of the American economy.

Running a business from a phone allows millions of everyday people to turn their skills, voices, and ideas into businesses. Creators can turn side hustles into careers, stay at home while still putting food on the table, and students can even pay their way through college.

While the average American may discredit creators as a mere hobby, Goldman Sachs, in their 2023 Creator Economy Report, projected that the global creator economy could grow to almost half a trillion dollars by 2027. The industry is not only content creators, in the U.S. there are full strategic teams at marketing agencies sourcing the right influencer for their client's marketing goals, developing traditional and digital first marketing campaigns and allocating million dollar budgets. These small businesses, everyday people at the heart of economic growth, deserve the same protections as traditional ones.

The Small Business Administration's mission of providing aid and protecting the interests of entrepreneurs should be extended to small businesses in this industry. Creators need access to dedicated creator economy experts, including lawyers, accountants, wealth management services to give creators and creative entrepreneurs the same level of support and protection as the SBA provides to restaurants and mechanic shops. Access to these resources provides creators not only a feeling of value and respect, but also the knowledge to navigate a growing industry.

#### **Growing Concerns**

### *The Right of Publicity and Intellectual Property*

The rise of the creator economy has also elevated the importance of the right of publicity - the ability to commercialize your name, image and likeness.

- Currently this right is governed by a patchwork of inconsistent state laws to protect privacy, and it requires federal attention. E.g. Brands, as large corporations, favor Delaware as their choice of law. Delaware does not recognize the Right of Publicity, while states like New York, Florida, and California do.
- As this industry expands, the federalization of right of publicity laws, in a manner similar to intellectual property laws, would help create unity and protect creators across the US, as digital content is national and global in reach.
- In the creator economy, creators are hired as independent contractors, yet marketing agencies often strong arm creators into giving up all rights to their work product while continuing to offload the responsibilities of production and distribution to the creator.
  - Unlike traditional actors who contribute toward “evergreen” works meant to last lifetimes, creators develop content only designed to last 30 to 90 days due to authenticity and seasonality, with Instagram stories only lasting 24 hours to capture incredibly timely moments.
- A brand’s insistence on ownership, with the intent to use at an unpredictably later date and the ability to create derivative works of this content could lead to massive disruption in the creator’s future partnerships with other brands.
  - Yet, the same brands will require a creator to represent and warrant that the creator freely enters into an agreement with them without any past obligations to other brands.
- Without direct case law or statutory guidance, legal professionals working to standardize and stabilize a very cyclical and periodic industry are forced to constantly educate and reeducate these powerful brands on the reality of the business in which they seek to take part.

### *Imbalance in Bargaining Power and the Trend Towards Monopolization*

The concentration of power among marketing agencies among a few large marketing agencies. This trend toward monopolization is creating a severe imbalance in bargaining power between contracting parties.

[Please see this visual aid from global adtech company, Eskmi, demonstrating the consolidation.](#)

- There is a lack of education in the legal implications of the intellectual property ownership and licensing clauses and other deal terms in these agreements.
- Agreements are silent on governing law and other important boilerplate clauses.
- Marketing agencies and their decentralized legal teams, if there is one, refuse to negotiate a creator's deal terms and contracts making deals unconscionable and very one-sized - a "take it or leave it attitude"
  - By disincentivizing creators from negotiating or even understanding their contracts, this practice leaves them vulnerable to accepting deals that prioritize short-term income and growth over their long-term wellbeing.
- Standardized payment timelines (ex: 30 days- or LESS) could protect creators the way small contractors in other industries are protected.
  - Most creators don't know they can sue in small claims court for nonpayment but more tools like Dupay, a collections service for creators, freelancers, and small businesses could be beneficial
- Payment delays and reducing the practice of NET 60 and NET 90 payments under a threshold, to protect smaller creators and those just starting out.
  - American Influencer Council, a 501(c)(6) nonprofit dedicated to the creator economy, is asking brands to commit to NET 30 payment terms.
  - Adding enforceable penalties for late payments (interest, fees, or required disclosure of delays) to standard contract terms would encourage brands to treat creator payments with the same urgency as other vendors.

### Issues Facing Industry Professionals

In this quickly evolving industry, many creators struggle to find professional help. This is attributed not only to a lack of access, but also to a lack of industry professionals caught behind unclear regulations and uncertainty in authority.

- Managers, traditionally, are unregulated and are not always equipped with the resources to support their clients.
- Creator economy lawyers, without a federal license similar to the Patent Bar or a form of interstate safe harbor, risk triggering unauthorized practice of law issues while servicing their clients.
- The creator economy could substantially benefit from added regulations on representatives such as agents and managers.
  - Currently, the 'talent agent' is regulated in states like New York, California and Florida, where traditional entertainment hubs called for regulation of the business.

However, the nationwide and global reach of the creator economy begs the question for federal recognition of standards and rules for talent agents and managers working throughout the country on interstate deals with creators and brands – Managers, who exert a significant amount of influence onto the career of the creator may require similar oversight as the talent agent.

- Adding stronger distinctions between agents, managers, and the companies providing representation services ensures competency in their respective fields as well as protection against unauthorized practices amongst distinctive roles.
- Creators also deserve protection from predatory managers, particularly in fee structure and when exiting representation, just as much as predatory marketing agencies. Unlike real estate agents and sports agents, who have set regulations on commission caps, talent managers and agents lack these same regulations.
  - In California, for example, creator managers merely have vague guidelines governed by the department of consumer affairs. Additionally, talent agencies are governed by the same local laws as employment agencies that place home health aids into homes.
- That is to say, regulations among managers and agencies are vague and oftentimes ineffective in applicability in this growing sector of the economy. Codifying or creating a standardized cap on commissions for managers and agents in the creator economy could prohibit these predatory practices.

### *Mental Health and Financial Protections for Children*

While Congress is currently acknowledging the mental health of minors on social media and there are a few scattered state laws that require protective financial trusts for child performers, the lack of national oversight enables forum shopping and exploitation of creators where no regulations exist.

There are also the risks of overexposure and omnipresence that can lead to severe mental health issues and doxxing. Often, creators are everyday people, not celebrities, and therefore have not been exposed to such scrutiny, and lack the training and resources to properly deal with the mental repercussions. This, coupled with the nature of the internet – its fast moving pace and how vicious it can be – creates the perfect storm leading to mental health issues.

### *Foreign and Domestic Brands and Creators Working Together*

Social media goes beyond state lines and sovereign borders. Many U.S. brands work with Canadian and other international creators. Similarly, U.S. creators often work with brands headquartered abroad.

- Guidance on the following would alleviate both marketing agencies/brands and creators (including their representatives, whether managers or agents, and their larger legal and accounting teams) concerns about working with non U.S. entities and individuals:
  - Choice of law clauses
  - Tax compliance
  - Intellectual property
  - Immigration
  - Advertising regulations such as the FTC, Advertising Standards Authority (ASA) and Competition and Markets Authority (CMA) in the UK, Competition Bureau and Ad Standards in Canada and the European Union's Unfair Commercial Practices Directive and each member states national laws

#### Advertising Guidelines and Best Practices

Continuing from above, the FTC has not updated their [Disclosures 101 For Social Media Influencers](#) since 2019. In 2024 they did issue their [Rule on the Use of Consumer Reviews and Testimonials](#) which does have implications for small businesses and creators, but more current guidance on how to balance platform volatility and disclosure would be helpful.

- It is often a concern of creators and social media users alike, does using the built in platform disclosure tools i.e. having a “Paid Partnership” and/or “Branded Content” banner on your post disincentivize the platforms themselves from circulating the content to the poster's audience?
- From a consumer perspective, a law school classmate of mine shared this with me:
  - “I feel like I can't trust any videos or reviews these days because everything feels like it is a partnership or a paid ad. I don't know where to find information anymore that isn't paid for by the brand that produced the video. Or someone does make a great review or video and I think it's a paid for video so I don't give the creator any credit to what they are. Wherever we can protect creators' rights and opportunity to earn money, we should. I think solid policy around fiscal protection will trickle down to other areas of the industry.”

#### Support for Accountants in Protecting Creators: Taxes, Expenses, Deductions

Similar to how creators need dedicated lawyers in this space to advise and counsel on contracts and intellectual property, support for CPAs, tax professionals and wealth management services is needed.

- In my call with staffers preparing for this hearing, it was mentioned the U.S. House is considering updating the Tax code to provide clarity for 1099 freelancers and contractors vs employees
- Traditional entertainment professionals have SAG-AFTRA, WGA and other collective bargaining agreements and specialized experts to navigate the financial and tax implications of being a performer, could we have similar guidance for creators?
  - Suggestion from a CPA in online crowdsourcing and research:
    - “Replicating the tax rules for movie production expenses but for content creators. I know movies/ productions take a while to film, etc. but the deductions available to them should be similar.
    - Guidance for creators on what can be expensed and deducted
      - “Someone that is a fashion/lifestyle blogger/influencer. If they buy something like a piece of furniture, make posts about it, get commissions from the link but then use it personally, how does that get treated? Guidance is needed on stuff like that!”
    - Guidance for accountants and creators doing their own taxes on expenses and deductions
      - Membership clubs such as Soho House are often used as coworking spaces by creatives, could this be a business expense?
      - Production costs such as wardrobe and beauty maintenance is often treated as an expense, should it be?
- Guidance on which entity choice a creator or digital small business should consider when formalizing their business would be helpful
  - Plus, because each state handles misclassification of entities differently, perhaps relaxed misclassification laws for independent contractors as well

### Platform Volatility, AI and More Intellectual Property Considerations

The rise of artificial intelligence in every facet of American life coupled with inadequate intellectual property protections is creating a perfect storm of platform volatility issues for creators and small businesses trying to grow and support their families.

- Over the last few years there have been an increase in issues such as deepfakes, synthetic influencers and parody accounts, and account hacking from bot farms, often an influx of fake followers tied to other countries that take over an account and destroy its viewership and ability to monetize. Guidance on how to navigate these issues is needed
- Concern from small businesses using social media as well, where there is a growing practice of bigger companies using the Digital Millenium Copyright Act (DMCA) tools built into platforms to restrict and shut down their competition, whether it's a YouTube channel copyright strike or a direct-to-consumer jewelry business
  - These are traditionally considered unfair trade practices and lawyers dedicated to this industry could provide guidance if creators know to hire them
- In the event of these scenarios, often a creator's only recourse is a DMCA takedown action
  - But they are cost prohibitive at volume and creators are often unaware these traditional IP protections are available to them
    - Should there be trademark and copyright group registrations for videos similar to photos?
      - Would give creators the ability to protect and commercialize at scale their work, such as recipes, poetry and artwork, etc.
    - Case law/precedent needed to protect creators and small business owners from loss of income and unfair trade practices but a federal right of publicity could help fill the gap
- Guidance on AI
  - Training models are known for using huge bodies of work
    - Touch back on copyright registrations above, group registrations could protect creators whose work is used for training
  - Anthropic settlement and ongoing Midjourney lawsuits by three major studios, could creators apply these rules to their own scenarios?

## **Conclusion**

At its core, the creator economy is about marketing and opportunity. Creators have effectively become their own small businesses, and they deserve treatment as such. Having case law as a framework for legal issues creators are beginning to face at scale, such as loss of income and unfair trade practices is deeply needed.

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Developing a federal right of publicity would fill the gaps in underprotected states, promoting regulation and unity across a nationwide industry. Additionally, access to educational resources and cooperation from local and state governments nationwide providing professional services dedicated to creators and creative entrepreneurs would be integral to the continued growth, knowledge, and success of this industry.

My testimony demonstrates how creators and creative entrepreneurs such as artists, photographers and the like are small business owners. As such, they need and deserve the same infrastructure of support and protection that other American entrepreneurs receive.

This is a pivotal moment. Thank you for inviting us to start this conversation. It is my hope that with smart, inclusive policy, the U.S. can lead the world in building an innovative, fair, and sustainable creator economy. And I look forward to being a part of this charge.

I want to take a second to thank my colleagues and contributors in this testimony, who over the course of the last week have helped me compile research and feedback and reviewed my submission to ensure we're all represented.

Frank Poe, Poe Law PLLC; Brittany Ratelle, Ratelle Law; Chuong Bui, Attorney and co-founder Counsel For Creators; Dave Ugelow, General Counsel at Fohr; Sophia Sofferman, Partner, Co-Founder at NTSS Law PLLC; Claire Gregory and Medha Krishen, recent law school graduates awaiting Bar Exam results and various talent managers and industry experts in my network.