



Germany: Labeling requirements for fashion influencer marketing – more transparency can also lead to restrictions

20 MAY 2019

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Many observers in Europe today feel that the practice of labeling of advertising in social media, such as Instagram, has gone a little off the rails. The rule of thumb: “Where there is advertising, there must be labeling” is taken *ad absurdum*. In fear of receiving a warning letter for incorrect labeling, many influencers label posts that name brands as advertising even if they have not been paid for it.

Under Sec. 6 German Telemedia Act (Telemediengesetz – TMG), Sec. 5a (6) German Act Against Unfair Competition (Gesetz gegen den unlauteren Wettbewerb – UWG), No. 11 Annex to Sec. 3 German Act Against Unfair Competition as well as Sec. 58 German State Broadcasting Treaty (Rundfunkstaatsvertrag – RStV), commercial communication must be clearly identifiable as such. However, fashion influencers are becoming increasingly insecure. What must they specifically label as advertising – and how? Does a post with self-purchased items of well-known brands, which are named and tagged in the post, need to be labeled with *#advertising*?

If you want to earn money as an influencer in Germany, what is the general legal framework?

In principle, everything is quite simple: commercial communication must be clearly identifiable as such. If this is not the case, the commercial communication must be labeled. If commercial communication takes place in the context of editorial content – such as a fashion blog – it is called advertising and must also be separated from the editorial content. However, when is content considered commercial communication or advertising? This is obvious where the communication comes directly from an enterprise. Nonetheless, what is the difference between an editorial product recommendation and an advertising post? The key indicator for commercial communication is whether any consideration was received for the post, which does not necessarily have to be a fee, but can be any monetary value service. Such monetary value services are, for example, an attractive voucher, free product samples or saved expenses. Such saved expenses can be, for example, flights, travel expenses or hotel overnight stays, that are granted for the later post.

However, the sole use of a product that has been made available without any obligation is, in general, not seen as commercial communication or advertising that requires a labeling. Only excessive promotion of a product without any objective reason can turn a post into advertising.

The question of whether every reference to a brand constitutes advertising is a

matter of concern for many fashion influencers. This seems not to be the case in other media (for instance, print magazines like Vogue). Do we not need an unambiguous guideline that prevents many influencers from labeling almost every post that contains a link or brand name as advertising, as most of them currently do?

As soon as and as long as an influencer earns or wants to earn money with its activity, it is obliged to know and implement the framework conditions that apply to it. This is not an unfair, difficult or even unreasonable obligation. The regulations in this area are even more generous than, for example, in the broadcasting sector. On the whole, however, the requirements are the same. Differences are due to the specific characteristics of the respective media.

Warning letters have been issued with reference to the German Act Against Unfair Competition. Are the regulatory authorities now required to establish precise guidelines or do influencers, due to their potentially international range, have to pay attention to other legal principles, such as EU-compliant regulations?

These legal procedures are in line with the market and not unfair. The regulatory authorities, however, are supervisory authorities under public law and act with complaints up to and including prohibitions. They cannot impose mandatory requirements on the civil courts, as they only act within their supervisory system. Nevertheless, assessments by the regulatory authorities may be helpful in cases of doubt.

At the end of the day, by the way, one should consider carefully whether or not transparency, which could also lead to further restrictions, is really wanted. And of course online media do not stop at borders. However, no problems should arise in other EU countries, since, on the one hand, the rules are standardized and, on the other hand, the country-of-origin rule protects German publications.

Helpful advice for fashion influencers

At this time, it seems pretty clear that, under German legislation, influencers do not have to label brand names as advertising if they refer to self-acquired and not “excessively” promoted and praised products. Nevertheless, many do exactly this in order to avoid a warning letter.

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