[DE] Berlin Appeal Court on influencers' obligation to label advertising

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In a ruling of 8 January 2019, the Kammergericht Berlin (Berlin Court of Appeal - KG Berlin) addressed the question of when influencers should label social media posts as advertising. It decided that posts containing links to product providers do not generally need to be labelled as advertising. Rather, the question of whether the content of a post is functionally linked to the promotion of the company concerned should be checked on a case-by-case basis. The judgment is the first to set out principles for distinguishing between advertising and the editorial content of influencers and is relevant to their activities on both social media and video-sharing platforms.

In the case at hand, a registered association whose activities included fighting unfair competition had applied for emergency injunctions under competition law against an Instagram blogger and influencer. According to the association, the latter had carried out commercial advertising in three posts by including links to other companies' websites without labelling them as such, thereby infringing the Gesetz gegen den unlauteren Wettbewerb (Unfair Competition Act - UWG). On 24 May 2018, the Landgericht Berlin (Berlin District Court) had granted a temporary injunction, prohibiting the blogger from publishing such posts with links to the websites of product providers without labelling them as advertising. The blogger had subsequently labelled all her posts as advertising.

The KG Berlin upheld the appeal against the injunction with regard to one of the three posts concerned. The influencer was able, by submitting an affidavit, to establish that she had not received any payment from the companies concerned or any other parties. The post had only contained information about particular items of clothing and accessories produced by the manufacturer. The court therefore did not consider that it should be labelled as advertising.

Regarding the other two posts, the court could not see any connection between the content and the links provided. The only apparent purpose of the links had been to make readers curious about the company websites concerned. If they clicked on the links, they would be confronted with advertising. The blogger could not therefore claim that this was editorial content protected under the Basic Law.

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The ruling therefore gives influencers a little more clarity over the possibility of inserting links to certain brands in their posts without having to label them as advertising, as long as they are posts with editorial content and there is no cooperation with the company concerned.

The Direktorenkonferenz der Landesmedienanstalten (Conference of Regional Media Authority Directors - DLM) welcomed the decision. The regional media authorities monitor radio, television and telemedia in Germany. Cornelia Holsten, the DLM Chair, said in a press release: “The court’s decision had been eagerly anticipated by the industry and shows that it was worth the wait. Advertising requirements must be the same for all types of media, whether print, online, television or radio, even if they are sometimes based on different laws. Differing standards harm transparency and irritate users because they water down the definition of advertising.”

Pressemitteilung des KG Berlin vom 23. Januar 2019

https://www.berlin.de/gerichte/presse/pressemitteilungen-der-ordentlichen-gerichtsbarkeit/2019/pressemitteilung.777446.php

Berlin Court of Appeal press release of 23 January 2019

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