[DE] German courts issue rulings on Instagram influencer labelling obligation

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In two recent judgments issued on 21 July and 9 September 2020, the *Landgericht Köln* (Cologne Regional Court, Case no. 33 O 138/19) and the *Oberlandesgericht Karlsruhe* (Karlsruhe Regional Court of Appeal, Case no. 6 U 38/19) ruled that Instagram influencers were obliged to label references to brand names as advertising.

The *Landgericht Köln* decided that such posts by Instagram influencers should be labelled as advertising even if no remuneration was involved. Product recommendations constituted a commercial practice even if no advertising contract had been agreed.

In this case, a fashion blogger had regularly published images and stories on her Instagram account in which she provided links to the manufacturers of the clothes she was wearing. If users clicked on the link, they would be taken to the company's page on the social network. The blogger's activities as an influencer earned her a high six-figure euro sum every year. An association for the promotion of commercial and independent professional interests, including fair competition, had applied for three injunctions after the influencer had published posts in the autumn of 2019 without explaining the commercial purpose of the posts. It thought that the defendant should have labelled the three posts as advertising and that the existence of commercial intent did not depend on whether she had received remuneration, free goods or similar, since it should be assumed that there had been a "commercial connection". The influencer considered the posts lawful because she had not signed any advertising contracts with the tagged companies, had provided the links for editorial reasons, and had bought and paid for the clothes herself.

The court upheld the association's claim for an injunction on the basis of Articles 8(1)(3)(2) and 5a(6) of the *Gesetz gegen den unlauteren Wettbewerb* (Unfair Competition Act – UWG). According to Article 5a(6) UWG, unfairness is deemed to have occurred where the commercial intent of a commercial practice is not identified, unless this is directly apparent from the context, and where such failure to identify the commercial intent is likely to cause the consumer to take a transactional decision which he would not have taken otherwise. The court considered all the posts to have been a commercial practice. It was not necessary

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for the practice in question to have involved remuneration. The links to third-party companies in the posts promoted their sales, at least indirectly, by raising awareness of the companies concerned. The publication of the posts in question, including the company tags, also promoted the influencer's own company and presented her as a potential advertising partner. Commercial intent did not need to be the only motive for a commercial practice. It was sufficient if, when viewed objectively, the practice was primarily aimed at promoting the sale of goods and services.

In a similar case, the Karlsruhe Regional Court of Appeal decided that so-called "tap-tags", that is, links activated by tapping on an object in an image, should be labelled as advertising. The influencer concerned had argued that she had merely been expressing personal opinions. The court believed that this threatened fair competition because of the conflict between the private image on the one hand and the elements of communication that were influenced by third-party interests on the other. This lack of transparency created an obligation to clarify where third-party products were being promoted, regardless of whether payments were made for the use of "tap-tags".

These decisions were contradicted by a ruling of the *Oberlandesgericht Hamburg* (Hamburg Regional Court of Appeal) of 2 July 2020 (Case no. 15 U 142/19), which, in a similar case, had decided that the commercial intent of the commercial practice depended on the circumstances and had been immediately apparent to the consumer. Since the post concerned therefore did not need to be labelled as advertising, it was not anti-competitive.

Urteil des LG Köln vom 21.07.2020 - 33 O 138/19

https://openjur.de/u/2269061.html

Cologne Regional Court decision of 21 July 2020 – 33 O 138/19

Fundstellen zum Urteil des OLG Karlsruhe vom 9. September 2020 - 6 U 38/19

https://dejure.org/dienste/vernetzung/rechtsprechung?Gericht=OLG%20Karlsruhe&Datum=09.09.2020&Aktenzeichen=6%20U%2038%2F19

Karlsruhe Regional Court of Appeal decision of 9 September 2020 – 6 U 38/19

Urteil des OLG Hamburg vom 02.07.2020 - 15 U 142/19

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https://openjur.de/u/2271476.html

Hamburg Regional Court of Appeal decision of 2 July 2020 – 15 U 142/19

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