

## District Court of Berlin: Duty of an influencer to identify presentation of products bought by herself as advertising

Translated from Hogan Lovells [German language blog](#)

*In an attention-grabbing decision (case ref. 52 O 101/18), the District Court [Landgericht] of Berlin ruled that, even in cases where products bought by influencers are presented by the latter on Instagram, such presentation must be identified as advertising if the image description includes a link to the Instagram account of the manufacturer.*

A competition association [*Wettbewerbsverband*] moved for the issuing of a preliminary injunction against an influencer with 50,000 followers on Instagram who uses this platform and her blog to report on her own life as well as other topics such as fashion and consumer electronics. According to the association, she should have identified several posts of hers as advertising. The respondent countered that she had purchased the products shown in the images herself and that she had only included the link to the Instagram accounts of the manufacturers in anticipation of questions her followers might ask.

### Decision

The District Court of Berlin granted a cease and desist claim based on sec. 5a para. 6 of the German Unfair Competition Act [*Gesetz gegen den unlauteren Wettbewerb – UWG*]. The question at the heart of the decision was whether the influencer's activities constitute a commercial practice pursuant to the legal definition of sec. 2 para. 1 no. 1 *UWG*. The District Court was of the opinion that, from a purely objective point of view, the presentation of the goods by an influencer serves to promote sales, since the influencer's followers are led – via the links provided – to the Instagram accounts of the companies, where they would then be presented with the entire product ranges of the latter. An intention to promote competition need not exist. In order to anticipate the followers' questions, it is not necessary to include a link to the entire shop of the respective company. The nature of the Instagram account in question, too, suggests that this constitutes a commercial practice. With 50,000 followers, sponsoring as its main source of income, its own project manager and a business address at the premises of an advertising agency, the account is commercially oriented. Even the information issued by the *Medienanstalten* [the umbrella brand of the 14 state media authorities in Germany], according to which products bought by oneself do not have to be identified as advertising, does not apply to a person with such a large number of followers. In addition, the court took the view that the respondent is also acting in order to promote her own company, since she is generating income from the cooperation with other companies and therefore also has an interest in making her Instagram account appealing. Any private motivation that may exist on her part cannot be clearly separated from the commercial motivation that likewise exists. The identification of the posts as advertising can also not be dispensed with. The broad audience for the posts includes not only those followers who are familiar with the mechanisms of Instagram but

also groups in need of protection, such as children, who, because of their inexperience, would be unable to recognise the promotional character of the posts.

### **Comment**

With this judgment, the District Court of Berlin triggered an outcry in the influencer scene. In reaction to it, some influencers are now identifying every post of theirs as advertising. Irrespective of these phenomena, however, the actual problems associated with the judgment are also being discussed: how is the law going to deal with the fact that, in the work of the influencer, private and business life are one and the same? Can those who take up this profession therefore no longer act as private persons on social media? Must special attention be paid where links – part of the established communication on social media – are concerned? These questions will now have to be answered by the Berlin Court of Appeals [Kammergericht].

### Contact



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