Dealing with social media influencers—Germany

Produced in partnership with Hogan Lovells International LLP

This Practice Note is aimed primarily at brands wishing to engage with social media influencers (or other talent) for particular social marketing campaigns and advertising promotions in Germany. It covers:

- The nature of social media influencers
- Influencer labelling obligations—key regulations
- Manner of labelling
- Sanctions and oversights
- Requirements of other regulations
- Copyright protection for influencer content
- Key provisions in influencer contracts

The nature of social media influencers

Influencer marketing is a common form of advertising in which companies hire a person, the influencer, to promote their products (Higher District Court of Hamburg GRUR-RS 2020, 18139, para. 55; *Zurth/Pless*, ZUM 2019, 414 (414 et seq.)). The influencer is an interesting contract and advertising partner for the company as they have built either a large following guaranteeing a broad reach for their posts (so-called celebrity influencer) or a following of a (small) homogeneous group of followers interested in the same topic (so-called micro-influencer) (cf. Draheim/Mittelstaedt—HL Engage Influencer Snapshot, see Ins and outs of celebrity influencers). In the latter case, the influencer often serves as authority on the topic (see also Lettmann, GRUR 2018, 1206 (1211)).

The appeal of influencer marketing is obvious. Many of the influencers use their social media profiles also for private postings, establishing a relationship with their followers and also actively interacting with them. If they present or recommend a product, their followers trust this recommendation and are more likely to buy such products than in cases in which the product is presented to them in 'normal' advertisement. The apparent private opinion of the influencer in relation to a specific product is the reason why the posts are viewed, and the products purchased (*Zurth/Pless*, ZUM 2019, 414 (415, 419 f.); see, in a more general way, also Higher District Court of Berlin GRUR 2019, 543 (545) – *Produkt-Tagging*, para. 36; see also District Court of Karlsruhe GRUR-RR 2019, 328 (330) – *Foto-Tagging*, para. 30).

However, the apparent private nature of such influencer posts can be problematic. One of the main principles in German law is the separation of editorial and advertising content, as well as the labelling of the latter. These separation and labelling requirements are regulated in several laws in Germany and are based on the constitutionally protected right of freedom of information (*Graefe*, RDV 2018, 185 (186); cf. *Laoutoumai/Heins*, MMR 2018, 108; *Zurth/Pless*, ZUM 2019, 414 (420)). These regulations also apply to influencer promotions (see only *Graefe*, RDV 2018, 185 (186); *Laoutoumai/Heins*, MMR 2018, 108 and see below the numerous cases cited).

The application of these established rules to influencer posts has been the focus of German case law on influencer marketing. Courts have dealt with cases brought against influencers for inadequate labelling. However, there has also been a case brought against a company where the engagement of an influencer had not been disclosed in her posts (Higher District Court of Celle GRUR 2017, 1158 – Hashtag #ad). This shows that the regulations on influencer marketing are relevant for companies and influencers alike.

Another aspect of influencer marketing, which so far has received less attention is the question of ownership and rights of use of the content created by the influencer when it is created in co-operation with a brand. This reinforces the importance of coverage of this in contracts between brand owners and influencers.

This Practice Note deals with influencer marketing in Germany. It is aimed at influencers as well as at brand owners engaging in advertising. This Practice Note focuses on influencer disclosure requirements, sanctions, and oversight for insufficient disclosure. Copyright in the (sponsored) content and key provisions in influencer agreements are also covered.

Influencer labelling obligations—key regulations

German courts have to date mainly dealt with the question of adequate labelling by influencers and in particular whether the conditions requiring labelling a post as advertising are met. This is particularly relevant in cases where the influencer has bought the product themselves, but still includes tap tags/links in their post to the company that sells the product.

These questions are addressed by three key statutes applicable to influencer marketing in Germany (*Detmering/Schonhofen*, DSRITB 2018, 817 (818); *Leeb/Maisch*, ZUM 2019, 29 (30)):

- the German Telemedia Act—Telemediengesetz (TMG; an English translation may be found under Telemedia Act (TMA))
- the German Interstate Media Treaty—Medienstaatsvertrag (MStV) of November 2020 replacing the German Interstate Broadcasting Treaty—Rundfunkstaatsvertrag (RStV). Note: Most of the cited literature in this Practice Note still refers to the older, but similar, regulations in RStV
- the German Act Against Unfair Competition—Gesetz gegen den unlauteren Wettbewerb (UWG; an English translation may be found under Act against Unfair Competition)

Disclosure requirements under TMG and MStV

Both the TMG and the MStV provide labelling obligations for influencers using the common forms of social media as they cover regulations for telemedia services in general.

Telemedia services are defined as services whose benefit consists of providing information and communication by electronic means, in particular via the internet. The concept functions as a generic term for multimedia services of any kind (*Martini*, in: Gersdorf/Paal, BeckOK Informations- und Medienrecht, 29th Ed., § 1 para. 8). Twitter, Facebook, YouTube, Instagram, TikTok etc are considered to be telemedia (cf. *Leeb/Maisch*, ZUM 2019, 29; *Pfeifer*, GRUR 2018, 1218 (1222); *Troge*, GRUR-Prax 2018, 87).

There are two provisions in particular that are important for influencer marketing: S 22 MStV and S 6 TMG. S 22 (1) MStV requires 'advertising' to be clearly recognisable and to be clearly separated from the rest of the content. S 6 TMG states that 'commercial communication' must be clearly identifiable as such.

Both regulations express the constitutional principles of the freedom of right of information, namely that advertising and editorial content must be separated, and advertising content must also be labelled as a matter of principle (*Graefe*, RDV 2018, 185 (186); cf. *Laoutoumai/Heins*, MMR 2018, 108).

Even though the MStV and the TMG use different terms, 'advertising' and 'commercial communication' have the same meaning, namely, that the influencer must have received some form of consideration (Higher District Court of Munich GRUR 2020, 1096 (1098) – *Blauer Plueschelefant*, para. 37 and 38; Higher District Court of Hamburg GRUR-RS 2020, 18139, para. 65 and 67; District Court of Munich GRUR-RR 2019, 332 (333) – *Cathy Hummels*, para. 29 et seq., 33 et seq.). The concept of consideration must be interpreted broadly. It can consist of a certain amount of money or the provision of the product or an invitation to a trip or event (Higher District Court of Frankfurt am Main GRUR 2020, 208 (209) – *Die Influencerin*, para. 10; *Zurth/Pless*, ZUM 2019, 457 (458); *Gerecke*, GRUR 2018, 153 (154)).

Even if a product is sent to the influencer without being subject to an agreement, ie in cases where the company only hopes that the influencer will present the product on its account and does not specify what must be done in relation to the content, this is usually sufficient consideration within the meaning of these regulations. Hence, brand control does not necessarily impact disclosure requirements. Even if a brand grants the influencer great creative liberty in how it presents the product, within a formal contractual relationship or outside such a relationship, this generally does not have any impact on disclosure requirements.

The MStV also covers self-promotion. This can be the case if the presentation refers to the influencer's own products, events or internet presence.

The MStV makes further specifications for broadcasting-like telemedia and 'linear television-like telemedia' (see *Fiedler*, in: Gersdorf/Paal, BeckOK Informations- und Medienrecht, 30th ed., S 74, para. 36 for criticism of the term 'linear television-like media'). Broadcasting-like telemedia are contents which are similar to radio or television in form and design and which are provided from a catalogue defined by the provider for individual retrieval at a time selected by the user, S 2 (2) No. 13 MStV.

Television-like telemedia are particularly relevant for this Practice Note as they are often used by influencers.

The term television-like telemedia covers video, but not mere picture pages, such as those on Instagram (*Pfeifer*, GRUR 2018, 1218 (1222) and *Gerecke*, GRUR 2018, 153 (154)). They are similar to television and offered on-demand, meaning that the user can choose to view the content at a time of their choice (*Troge*, GRUR-Prax 2018, 87; see also the definition in S 2 (2) No. 13 MStV).

YouTube content may be considered 'television-like' (*Pfeifer*, GRUR 2018, 1218 (1222); *Detmering/Schonhofer*, DSRITB 2018, 818 (819); *Leeb/Maisch*, ZUM 2019, 29 (30); *Gerecke*, GRUR 2018, 153 (154)). For example, the State Media Authorities (Landesmedienanstalten) warned the video blogger 'Flying Uwe' for not disclosing sponsored YouTube videos as being commercial (*Troge*, GRUR-Prax 2018, 87).

Furthermore, IGVT, a video application from Instagram, may also be considered 'television-like' (*Zurth/Pless*, ZUM 2019, 457 (460)). In contrast, short video sequences on Instagram Stories or Snapchat will likely not be considered 'television-like' (*Troge*, GRUR-Prax 2018, 87; *Zurth/Pless*, ZUM 2019, 457 (463) seem to indicate that this could be different if there is the appearance of a video sequence due to several stories in a row).

Therefore, if the influencer receives some form of consideration, the influencer content will usually fall under one or both of these regulations. Then the first question of whether the content must be labelled in principle, can then be answered in the affirmative.

Disclosure requirements under the German Act Against Unfair Competition

The German Act Against Unfair Competition (UWG) applies irrespective of the medium the influencer uses (*Detmering/Schonhofen*, DSRITB 2018, 817 (819)). It therefore applies to, for example, content posted on Facebook, Instagram, Tik Tok and YouTube, and will also cover new platforms.

The most relevant provisions are S 3 (3) in combination with No. 11 of the Annex of the UWG and S 5a (6) UWG.

- S 3 (3) in combination with No. 11 of the Annex of the UWG—this provision is relevant as it prohibits so-called advertorials. According to this provision, using editorial content for the purpose of sales promotion that was paid for by a brand owner, is deemed to be an illegal commercial practice if the connection to the brand is not clearly identifiable. As with the MStV and the TMG, this provision requires some form of consideration (Higher District Court of Hamburg GRUR-RS 2020, 18139, para. 66). The above explanations apply to the type of consideration here as well
- S 5a (6) UWG—other than the aforementioned provisions of the TMG, MStV and S 3 (3) in combination with No. 11 of the Annex of the UWG, S 5a (6) UWG does not require receipt of any form of consideration by the influencer. This is why S 5a (6) UWG is at the core of the German case law as payment of any kind of consideration could not be established by the plaintiff in the majority of the cases (Higher District Court of Munich GRUR 2020, 1096 (1097) – *Blauer Plueschelefant*, para. 28; Higher District Court of Berlin GRUR 2019, 543 (546) – *Produkt-Tagging*, para. 70; Higher District Court of Hamburg GRUR-RS 2020, 18139, para. 9, 43), so that the aforementioned regulations were not applicable. In these cases, the influencer either used so-called tap-tags within the picture or links in the caption to the companies whose products were depicted in the picture or mentioned in the caption (Higher District Court of Berlin GRUR 2019, 543 – *Produkt-Tagging*, para. 17; Higher District Court of Munich GRUR 2020, 1096 – *Blauer Plueschelefant*; Higher District Court of Hamburg GRUR-RS 2020, 18139, para. 3 et seq.; Higher District Court of Braunschweig MMR 2019, 467 (468), para. 9). In some cases, links/tap-tags to companies whose products were not shown in the picture were used (Higher District Court of Berlin GRUR 2019, 543 (544) – *Produkt-Tagging*, para. 26 et seq.; Higher District Court of Frankfurt am Main GRUR 2020, 208 (209) – *Die Influencerin*, para. 10; District Court of Karlsruhe GRUR-RR 2019, 328 (330)
  – *Foto-Tagging*, para. 32)

Misleading through omission—S 5a (6) UWG

According to S 5a (6) UWG, unfairness shall 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 causes the consumer to take a transactional decision which they would not have taken otherwise.

A commercial practice can be assumed if the act, when viewed objectively, serves the purpose of promoting the sale or purchase of one's own or any third party's goods or services (S 2 (1) No. 1 UWG). If the act primarily serves objectives other than influencing the business decision of consumers with regard to products, and if it merely has a reflex effect on the promotion of sales or purchase, it does not constitute any commercial practice within the meaning of S 2 (1) No. 1 UWG. Accordingly, statements of an ideological, scientific, consumer policy or, in particular, editorial nature made by companies or other persons that are not functionally connected with sales or purchase promotion are not subject to the UWG (Higher District Court of Berlin GRUR 2019, 543 (544) – *Produkt-Tagging*, para. 24; Higher District Court of Munich GRUR 2020, 1096 (1097) – *Blauer Plueschelefant*, para. 26; District Court of Hamburg GRUR-RS 2020, 18139, para. 36).

Influencers have regularly denied that they wanted to promote their own or someone else's business, claiming that they only wished to avoid the expected questions of their followers about the products as presented. This was why they linked them to the respective companies selling the products. They maintained that by doing so they did not have to reply to individual questions. Linking, in this respect, would arguably correspond to the very nature of social media (cf. Higher District Court of Berlin GRUR 2019, 543 (544) – *Produkt-Tagging*, para. 67; Higher District Court of Munich GRUR 2020, 1096 (1096 et seq.) – *Blauer Plueschelefant*; Higher District Court of Frankfurt am Main GRUR 2020, 208 (209) – *Die Influencerin*).

The majority of the courts have so far rejected this argument:

- it was held that if the influencers had only wanted to satisfy their followers' interest in information, the mere information would have been sufficient, but not a link (Higher District Court of Hamburg GRUR-RS 2020, 18139, para. 42; Higher District Court of Braunschweig MMR 2019, 467 (468), para. 15; confirmed in Higher District Court of Braunschweig GRUR-RS 2020, 12111, para. 48)
- per the courts, in any case, the influencers were interested in promoting their own business. In the courts' opinion, the posts led to more attention and resonance and made the influencers more interesting to their followers. In addition, per the courts, influencers also got themselves into conversation as future advertising partners for companies. Their own presentation led to an increase in the value of the offered (advertising) services, in the court's opinion (see for all of the above Higher District Court of Berlin GRUR 2019, 543 (544) – *Produkt-Tagging*, para. 22; Higher District Court of Hamburg GRUR-RS 2020, 18139, para. 43, 45 et seq.; Higher District Court of Frankfurt am Main GRUR 2020, 208 (209) – *Die Influencerin*, para. 13; Higher District Court of Braunschweig MMR 2019, 467 (468), para. 13 and 14; District Court of Karlsruhe GRUR-RR 2019, 328 (330) – *Foto-Tagging*, para. 33 et seq.; District Court of Munich GRUR-RR 2019, 332 (334) – *Cathy Hummels*, para. 39)
- in most cases, it was, in addition, assumed that the link would also promote the external company linked to in the posts, irrespective of whether or not any form consideration was received (Higher District Court of Berlin GRUR 2019, 543 (544) – *Produkt-Tagging*, para. 23, 25; Higher District Court of Hamburg GRUR-RS 2020, 18139, para. 38 et seq.; Higher District Court of Frankfurt am Main GRUR 2020, 208 (209) – *Die Influencerin*, para. 10; Higher District Court of Braunschweig MMR 2019, 467 (468), para. 13; Higher District Court of Braunschweig GRUR-RS 2020, 12111, para. 38, 42 et seq., 46; District Court of Karlsruhe GRUR-RR 2019, 328 (330) – *Foto-Tagging*, para. 29, 40; District Court of Munich GRUR-RR 2019, 332 (334) – *Cathy Hummels*, para. 38). This applies, in particular, if there is no connection between the link and the image/text (Higher District Court of Berlin GRUR 2019, 543 (544) – *Produkt-Tagging*, para. 25 et. seq.), but was assumed by courts even in the case of a direct connection between the link and the picture/caption (Higher District Court of Frankfurt am Main GRUR 2020, 208 (209) – *Die Influencerin*, para. 10). In the opinion of the courts, the purpose of the accounts was to influence followers, which is already apparent from the job title of the 'influencer'. The courts found that highlighting the special nature of the products was done precisely for the purpose of promoting the sales of the linked to companies (see for the above Higher District Court of Hamburg GRUR-RS 2020, 18139, para. 39–41; Higher District Court of Frankfurt am Main GRUR 2020, 208 (209) – *Die Influencerin*, para. 10; Higher District Court of Braunschweig GRUR-RS 2020, 12111, para. 45; District Court of Munich GRUR-RR 2019, 332 (334) – *Cathy Hummels*, para. 38)

There are, however, two exceptions. Both the Higher District Court of Berlin in the case *Produkt-Tagging* and the Higher District Court of Munich in the case *Blauer Plueschelefant* denied a commercial practice under particular circumstances.

Produkt-Tagging

In the *Produkt-Tagging* case, the Higher District Court of Berlin assumed that, in cases where there is no consideration (Higher District Court of Berlin GRUR 2019, 543 (546) – *Produkt-Tagging*, para. 69 and 70), influencer posts can be of an editorial nature rather than advertising content. This is only the case if the contribution alone, or at least primarily, serves to inform or provide opinion to their addressees (Higher District Court of Berlin GRUR 2019, 543 (544) – *Produkt-Tagging*, para. 25).

The court held that influencer posts could be editorial content, where the specific composition of the products (in the particular case of clothing and accessories) could be characterised by a selection and preparation for an undefined majority of people. In such cases, the interest of visitors was not limited to viewing images. It was at least also a matter of imitating selections and combinations or finding ideas for their own appearance. Consequently, the court argued that the announcement of the brand name under which the presented products were offered and where they could be obtained, answered an existing need for information (Higher District Court of Berlin GRUR 2019, 543 (546) – *Produkt-Tagging*, para. 66).

The court also followed the argument that linking served the information needs of the followers and in this respect drew a comparison with an offline magazine in which the sources of supply were also indicated (Higher District Court of Berlin GRUR 2019, 543 (546) – *Produkt-Tagging*, para. 67 et seq.).

The court assumed that the links to the companies alone did not lead to a reclassification of the editorial content into advertising content. In the court's assessment, the links only served as information. Furthermore, the court placed some emphasis on the nature of Instagram. According to the court, users expected not only written information requiring further research, but also links in particular, which constituted the essence of social media. In any event, advertising could not be assumed if the link did not directly enable the consumer to purchase the product (Higher District Court of Berlin GRUR 2019, 543 (547) – *Produkt-Tagging*, para. 79–84).

Finally, the court decided that it was not appropriate to consider the Instagram account as a whole, but that each post had to be evaluated individually (Higher District Court of Berlin GRUR 2019, 543 (544, 547) – *Produkt-Tagging*, para. 18, 85 et seq.). A general labelling of all posts, as had become common practice with influencers after various judgments, was not in the interest of consumer protection, because the labelling obligation would then become ridiculous.

Blauer Plueschelefant

Even though the Higher District Court of Munich confirmed the finding of the other courts that unpaid posts also may serve to increase the influencers' own values for possible future partnerships with the companies (Higher District Court of Munich GRUR 2020, 1096 (1097) – *Blauer Plueschelefant*, para. 27), in the end it rejected the presence of a commercial practice (Higher District Court of Munich GRUR 2020, 1096 (1097) – *Blauer Plueschelefant*, para. 28).

It held that the general interest in making oneself interesting for advertising contracts through publications was not sufficient to assume an objective connection between the publications and the sales promotion for oneself or for others (Higher District Court of Munich GRUR 2020, 1096 (1097) – *Blauer Plueschelefant*, para. 28).

The court argued that the influencer met the information interest of her followers. According to the court, the followers were interested not only in her daily life, but also in the products she used or the clothes she wore. The tags/links, as well as information about experiences, therefore also belonged to the editorial part of the posts (Higher District Court of Munich GRUR 2020, 1096 (1097) – *Blauer Plueschelefant*, para. 29).

In this respect, the court also drew a comparison with conventional fashion magazines. In the opinion of the court, the aim of the influencer to make herself more interesting for advertising contracts is also immanent to the actions of the media industry as a whole, which is dependent on advertising revenue. It held that the promotion of the products was merely a reflex of the self-portrayal and, at least in so far as the influencer did not receive any consideration, did not lead to the assumption that her commercial action was in favour of those undertakings (Higher District Court of Munich GRUR 2020, 1096 (1097) – *Blauer Plueschelefant*, para. 29).

Exception to disclosure requirements—advertising nature of the content apparent from circumstances

The District Court of Munich in the case *Cathy Hummels* (being the first instance case of the aforementioned case *Blauer Pl*ueschelefant) and the Higher District Court of Hamburg have both ruled that the posts that were the subject of the proceedings were advertising, even though the influencers did not receive any remuneration.

However, they came to the conclusion that labeling was nevertheless not required, since this was already recognisable from the circumstances. Hence, these decisions provide some guidance as to when the commercial purpose of the posts may be apparent from the circumstance. The courts referred to the following particular circumstances:

- the 'Blue Check Mark' on Instagram indicating a verified account which was only available to persons with a certain public reputation, or if there were a certain number of followers. It also served as a status symbol showing that the account was primarily used for commercial purposes (Higher District Court of Hamburg GRUR-RS 2020, 18139, para. 51; District Court of Munich GRUR-RR 2019, 332 (334) – Cathy Hummels, para. 44)
- high number of followers and likes which made it impossible for individual consumers to assume that these were private friends of the influencer (Higher District Court of Hamburg GRUR-RS 2020, 18139, para. 51; District Court of Munich GRUR-RR 2019, 332 (334) – Cathy Hummels, para. 46)
- use of an account name that differed from the real name (Higher District Court of Hamburg GRUR-RS 2020, 18139, para. 53)
- high quality of the images (Higher District Court of Hamburg GRUR-RS 2020, 18139, para. 54; other opinion of the District Court of Karlsruhe GRUR-RR 2019, 328 (331) – Foto-Tagging, para. 46; Higher District Court of Celle, GRUR 2017, 1158 – Hashtag #ad, para. 17)
- consumer awareness of influencer marketing as a new form of advertising with significant sales figures. In the Higher District Court of Hamburg's opinion, these figures alone made it clear that the people who made their Instagram account public were usually people who pursued a commercial purpose. Per the court, this was also known to the targeted public: an influencer was usually a well-known and popular person who got paid to be depicted with a certain product. The knowledge of this fact also made it obvious that the posts served a commercial purpose (Higher District Court of Hamburg GRUR-RS 2020, 18139, para. 55; the Higher District Court of Braunschweig has assessed these circumstances differently, Higher District Court of Braunschweig MMR 2019, 467 (468), para. 14)
- the Higher District Court of Hamburg also stressed that the 'private appearance' of the post did not prevent the commercial purpose from being obvious, since the public was also confronted with this form of advertising in other forms of marketing, and was therefore aware of these marketing measures (Higher District Court of Hamburg GRUR-RS 2020, 18139, para. 56; the Higher District Court of Frankfurt am Main GRUR 2020, 208 (209) – *Die Influencerin*, para. 10, 15 et seq. referred to the seemingly private nature of the posts to deny the obviousness of the commercial intent)
- due to the plaintiff's litigation in several cases in Germany (most of the cases in Germany are brought forward by the same plaintiff, an association for the prevention of unfair competition) and the associated press coverage, not only in legal media, consumers knew that influencer accounts were operated for commercial purposes (Higher District Court of Hamburg GRUR-RS 2020, 18139, para. 58)

Note: the influencers did not receive any remuneration in the *Cathy Hummels* case and in the case decided by the Higher District Court of Hamburg. However, as labelling is generally not required when it is apparent from the circumstance and also in cases to which the MStV, TMG or S 3 (3) UWG are applicable (*Leeb/Maisch*, ZUM 2019, 29 (32); *Mueller-Broich*, in: Telemediengesetz, 1st Ed. 2012, S 6 para. 3), ie in cases where remuneration was paid, the aforementioned principles could also be applied to such cases.

However, it remains to be seen whether the courts will be willing to apply this reasoning to cases in which consideration was paid, because then the media law labelling obligation of the MStV and the TMG could practically become obsolete (cf. *Zurth/Pless* ZUM 2019, 457 (459 f.)). So far, the state media authorities have accepted the obviousness within the range of the RStV only in relation to online shops and the company's own social media account (*Zurth/Pless* ZUM 2019, 457 (459 f.)).

Manner of labelling

None of the aforementioned regulations provide any indication of how to correctly label influencer content. However, there is case law providing some guidance.

Followers need to be able to clearly and unambiguously recognise the commercial intent of the post (Higher District Court of Munich GRUR 2020, 1096 (1098) – *Blauer Plueschelefant*, para. 33; District Court of Karlsruhe GRUR-RR 2019, 328 (331) – *Foto-Tagging*, para. 45; Higher District Court of Celle GRUR 2017, 1158 – Hashtag #ad, para. 9; *Graefe*, RDV 2018, 185 (189)). The influencer's commercial intent needs to be clear upon first glance (Higher District Court of Celle GRUR 2017, 1158 – Hashtag #ad, para. 11, 15; Higher District Court of Munich GRUR 2020, 1096 (1098) – *Blauer Plueschelefant*, para. 33; Higher District Court of Hamburg GRUR-RS 2020, 18139, para. 50; Higher District Court of Braunschweig GRUR-RS 2020, 12111, para. 52; District Court of Karlsruhe GRUR-RR 2019, 328 (331) – *Foto-Tagging*, para. 45; *Klickermann*, MMR 2020, 150 (153)).

It remains unclear what wording will be considered to be sufficient.

For the time being, it is advisable to label a commercial post as clearly as possible by using explicit German terms, such as 'Werbung' or 'Anzeige' (both translate to 'advertisement' in English) (Zurth/Pless, ZUM 2019, 457 (466); *Leeb/Maisch*, ZUM 2019, 29 (35); *Graefe*, RDV 2018, 185 (191); *Detmering/Schonhofen*, DSRITB 2018, 817 (828)).

It is not sufficient to include a general note in the Instagram biography that the account contains advertising (*Leeb/Maisch*, ZUM 2019, 29 (35)).

The disclosure should also be placed in a way that is hard to miss and recognisable upon first view, eg at the top of the caption for Instagram pictures (Zurth/Pless, ZUM 2019, 457 (465); *Leeb/Maisch*, ZUM 2019, 29 (35); *Graefe*, RDV 2018, 185 (191); *Detmering/Schonhofen*, DSRITB 2018, 817 (829)). The user should not have to first click on the post or on 'see more' (*Leeb/Maisch*, ZUM 2019, 29 (35); Klickermann, MMR 2020, 150 (153)). Moreover, disclosing the commercial intent within a 'cloud of hashtags' at the end of the post is considered to be insufficient (Higher District Court of Celle GRUR 2017, 1158 – Hashtag #ad, para. 12).

Using the label 'advertisement' in the image itself is possible, if it is recognisable in terms of the placing, the colour and the size (*Leeb/Maisch*, ZUM 2019, 29 (35)).

It is also important to disclose content as advertisement in videos.

A verbal reference is generally considered to be insufficient (*Leeb/Maisch*, ZUM 2019, 29 (36)).

The word 'advertising' should be displayed permanently and legibly (in terms of placement, colour, size) (*Leeb/Maisch*, ZUM 2019, 29 (36)). The state media authorities distinguish in their non-binding guidelines according to the type of video, eg where the product plays the 'main role', the labelling must be visible at all times. If it only plays a 'secondary role', the labelling must only be visible at the beginning of the video (see the guidance of Die Medienanstalten (state media authorities), see: Werbekennzeichnung bei Social-Media-Angeboten, last accessed on 19 October 2020; cf. Zurth/Pless, ZUM 2019, 457 (464)).

Although not explicitly addressed by the courts so far, the labelling should be in German language since commercial unfairness is evaluated from the standpoint of the German audience (Zurth/Pless, ZUM 2019, 457 (465); *Leeb/Maisch*, ZUM 2019, 29 (35)). For example, it cannot be assumed with certainty that the abbreviation '#ad' will be understood in Germany (Higher District Court of Celle, GRUR 2017, 1158 – Hashtag #ad, para. 10; Laoutoumai/Heins, MMR 2018, 108; *Detmering/Schonhofen*, DSRITB 2018, 817 (828)).

In the legal literature, it is assumed that 'Paid Content' or 'Branded Content' might be understood by the public (Zurth/Pless, ZUM 2019, 457 (465)).

Courts have also held that the necessity to disclose even more clearly and unambiguously is required in cases where the influencer has a young and therefore more impressionable audience, see also S 3 (4) UWG (District Court of Karlsruhe GRUR-RR 2019, 328 (331) – *Foto-Tagging*, para. 49 et seq.; see for advertsing vis-à-vis children in general Troge GRUR-Prax 2018, 87 (88 et seq.)).

Courts have therefore held that since children are less attentive and less skilled in reading than adults, the requirements for labelling as advertising must be significantly higher and more child-orientated (District Court of Karlsruhe GRUR-RR 2019, 328 (331) – *Foto-Tagging*, para. 49 et seq.; Higher District Court of Hamburg GRUR-RS 2020, 18139, para. 57).

However, in the *Cathy Hummels* case, in an obiter dictum, the court took a different view. It held that children in particular were aware of the work of influencers and bloggers. Per the court, they knew that being an influencer may be a very lucrative occupation to which they partially felt strongly attracted. Therefore, according to the court, it could not be assumed that children and young people were less aware than older consumers that Instagram posts on publicly available profiles of (well) known individuals with numerous followers had a commercial purpose (District Court of Munich GRUR-RR 2019, 332 (334) – Cathy Hummels, para. 50 et seq.).

Sanctions and oversights

Both the influencer as well as the company hiring the influencer may be the target of sanctions and oversights (*Leeb/Maisch*, ZUM 2019, 29 (31); Higher District Court of Celle GRUR 2017, 1158 – Hashtag #ad). At the moment, the case law seems to indicate that the influencer is more likely to be pursued. However, in cases where a collaboration between an influencer and a brand owner can be established, it seems also likely that claims will be directed against the brand owner to ensure that the company does not evade its own responsibilities by engaging influencers (cf. Zurth/Pless, ZUM 2019, 414 (423 f.); cf. *Detmering/Schonhofen*, DSRITB 2018, 817 (820)).

So far, the case law shown above has considered infringements of the UWG.

Pursuant S 8 (3) UWG, claims can be asserted either by competitors, consumers or competition protection associations, or chambers of industry, commerce or crafts.

Many of the cases handled so far have been initiated by an association for the prevention of unfair competition.

Claims based on the UWG are aimed at injunctive relief, S 8(1) UWG. The UWG also provides for awarding damages to competitors under certain circumstances, S 9 UWG (*Gerecke*, GRUR 2018, 153 (159); *Detmering/Schonhofen*, DSRITB 2018, 817 (820)).

S 115 MStV sets our which violations can be regulatory offences and subject to fines.

In the past, under the RStV one influencer on YouTube was fined by the state media authority as he had consistently failed to appropriately label his content (press statement of the Medienanstalt Hamburg/Schleswig-Holstein, see: Media Council of MA HSH decides to fine YouTuber "Flying Uwe" in the amount of 10,500 euros for lack of advertising labels, last accessed on 19 October 2020).

Finally, the regulations of the MStV and the TMG are considered to intend to regulate market behaviour in the interests of market participants within the meaning of S 3a UWG. This means that the UWG may also be applicable. Consequently, in the event of a violation of these regulations, claims for injunctive relief and damages under the UWG are possible (Higher District Court of Munich GRUR 2020, 1096 (1098) – *Blauer Plueschelefant*, para. 37 and 38; Higher District Court of Hamburg GRUR-RS 2020, 18139, para. 65; Gerecke, GRUR 2018, 153 (159)).

Requirements of other regulations

In addition to the above provisions, further obligations or restrictions may arise depending on the context of the influencer content.

In particular, the Health Claims Regulation applies to influencers providing nutritional advice and advertising corresponding products.

The Health Claims Regulation contains certain advertising restrictions on health claims for foods. These must also be complied with by the influencer, which was specifically decided in relation to the term 'detox' by the District Court of Hagen (District Court of Hagen MMR 2018, 106 (107) para. 25). The court also assumed a violation of the German Food, Commodities and Feed Code because of the misleading nature of the specific post (District Court of Hagen MMR 2018, 106 (108) para. 26).

This shows that both influencers and brand owners (S 8 (2) UWG) must comply with the requirements of the specific area in which the influencer is active.

Copyright protection for influencer content

The German Copyright Act should also be considered in relation to influencer marketing.

Depending on the specific posts, ie the image, video or text etc, these posts may be considered protected works under S 2 of the German Copyright Act which means that the author, eg the influencer or persons they are working with, such as photographers, may claim copyright protection in the created content.

German copyright law distinguishes between moral rights and exploitation rights.

Moral rights include the rights of publication and recognition of authorship. They are non-transferable and always remain with the author, ie the influencer, photographer etc (*Bullinger*, in: Wandtke/*Bullinger*, Urheberrecht, 5th Ed. 2019, Vor §§ 12 ff., para. 5). This means, for example, that even if the content is reposted or embedded within a different website, the influencer can still assert their right to be named as the author.

Per S 15 of the German Trademark Act, the author also has the exclusive right to exploit their work in material form. This right shall in particular include the right of reproduction (S 16), the right of distribution (S 17), the right of exhibition (S 18) and, in the context of the internet, the right of making works available to the public (S 19a).

However, the author may grant rights of use in these rights to third parties, S 31 of the German Copyright Act, and in particular the company they are working with.

German copyright law is author-friendly. This means that any type of use must be precisely defined and granted. If a type of use is not explicitly granted, it must be assumed in case of doubt that the right of use has not been granted (cf. *Wandtke/Grunert*, in: Wandtke/*Bullinger*, Urheberrecht, 5th Ed. 2019, § 31 Rn. 39, 47). This is why a provision on the use of copyright works is one of the key provisions in influencer contracts.

Key provisions in influencer contracts

The following list of key provisions in influencer contracts is not exhaustive. It represents the type of clauses that should be included in any contract even though they should always be adapted to the specific collaboration:

- **scope of the agreement:** this section would usually summarise the main aspects and the background of the agreement.

  Information such as the number of followers or engagement rate could be mentioned here, if relevant for the co-operation (in particular from the company's perspective). The latter information could, for example, also be linked to possibilities of (premature) termination of the contract or reduction of the consideration for the company if the information is incorrect

- **scope of services:** in this clause, details about the content and time schedule of the influencer's services as well as the number of posts should be provided. It should include references to the social media channel(s) which shall be used by the influencer (cf. Detmering/Schonhofen, DSRITB 2018, 817 (830)). The brand owner might also want to incorporate the obligation to use certain language or hashtags

- **control clauses:** some companies may want to have the opportunity to review and approve the content prior to the release (cf. *Detmering/Schonhofen*, DSRITB 2018, 817 (831))

- **brand reputation:** inaccurate brand messaging, mistakes and rogue behaviour on part of the influencer that damage a brand's reputation will usually be defined and dealt with in the contract. The contract should therefore include a clause prohibiting the influencer from publishing, for example, political, religious, insulting, pornographic and/or otherwise offensive or illegal content (cf. *Detmering/Schonhofen*, DSRITB 2018, 817 (831)). If breached, the company should have a right of termination (cf. *Detmering/Schonhofen*, DSRITB 2018, 817 (831)). If there is no contract, tort law as well as trade mark law in the case of unauthorised use of a trade mark may be applicable

- **labelling requirements:** as the legal situation regarding labelling requirements in Germany is still unclear and as the company itself may be liable under the German laws, this clause will be of great importance. It is recommended that this clause contains detail on how the advertising nature of posts will be disclosed (cf. *Detmering/Schonhofen*, DSRITB 2018, 817 (831)). With regard to the requirements of other regulations, such

as the Health Claims Regulation, the contract should include details of permitted language, not least in order to advise the influencer who will likely have less experience than the company (cf. Detmering/Schonhofen, DSRITB 2018, 817 (832))

- **rights of use in relation to the content:** this clause will determine the rights of use of the copyright work of the influencer, ie in relation to the created content. The German Copyright Act is author-friendly. Therefore, prior to the engagement, the company must be aware of whether and how it intends to use the influencer content in its own social media, websites, offline etc. Respective rights of use should be granted in the agreement
- **obligation of loyalty:** influencer marketing is based on the authenticity of the influencers. Therefore, they, too, have an interest in not promoting products of direct competitors. The company also has such an interest. It may therefore be considered whether loyalty obligations are required. There are various legal options for this, each of which must be adapted to the specific case

Conclusion

Influencer marketing has been a 'hot topic' of German advertising law for some time. However, a legally certain approach is not yet secure for every scenario due to a lack of German higher court decisions, especially with regard to labelling requirements.

If a company co-operates with an influencer, in every case a contract should be concluded to deal with some of the above-mentioned aspects and to provide more legal certainty for both the company and the influencer.

For more information about this Practice Note, please contact **Yvonne Draheim** and **Dr Sabrina Mittelstaedt** at **Hogan Lovells International LLP**.

For more information about Lexis®PSL TMT, please contact **Joshy Thomas** at **joshy.thomas@lexisnexis.co.uk**