



## #influencermarketing: Advertising on Instagram

### Paid posts must be identified as such: What is to be considered?

Influencer marketing is widespread. Risks abound.

March 2018, Jasper Hagenberg and Christine Nitschke

### The legal problem with paid posts

The legal problem with “paid” posts is that they are not clearly recognizable as advertising. Without any indication that it is advertising, the audience of such a post will understand it as the personal and private opinion of a neutral person. The advertising company takes advantage of this circumstance because this type of post is more credible for potential customers than an advertisement.

According to various legal regulations, advertising must be identified as such. These regulations can be found, for instance, in the German Act Against Unfair Competition (Gesetz gegen unlauteren Wettbewerb), the German Telemedia Act (Telemediengesetz) and the German Interstate Broadcasting Agreement (German Rundfunkstaatsvertrag).

### Mandatory identification of paid posts

How the commercial purpose of the post is to be identified depends on the circumstances of the individual case and the means of communication used. In any case, the information must be so clear that, from the point of view of an average member of the target consumer group, there is no doubt as to the existence of a commercial purpose. The commercial purpose must be obvious at first glance, according to a recent ruling by the Higher Regional Court of Celle.

In the past, the media authorities recommended that posts should be marked with #ad, #sponsoredby... or #poweredby... However, civil courts are not bound by these

recommendations.

More recently, various courts have been dealing with the identification of paid posts:

The Higher Regional Court of Celle had to decide whether the hashtag “#ad” is sufficient to identify a sponsored Instagram post. It was denied in the case in question. However, the court did not decide whether on principle the hashtag “#ad” fulfils the identification requirement for advertising. In this particular case, the hashtag “#ad” was used together with other hashtags and was not clearly visible at first glance. In addition, the hashtag “#ad” was placed only at the end of the post. The court was of the opinion that the majority of readers would not look at the large number of hashtags and would not notice the hashtag “#ad” at this point. According to the court, the fact that hashtags differ from the text in terms of colour does not change that. Rather, this makes it easier for the reader to identify the end of the actual text and therefore ignore the hashtags.

The Berlin Court of Appeals (Kammergericht) has decided that the attempt to identify paid posts with the hashtags “#sponsoredby...” or “#ad” is not sufficient. The court in Berlin was of the opinion that the tagged posts did not allow the commercial purpose to stand out at first glance.

A company that commissions a post to an influencer is usually liable for the lack of identification in the event that the instagrammer does not comply with the identification requirement. Moreover, the instagrammer him- or herself is regularly liable.

In the event of violations of the law, competitors or (consumer) associations can issue cost-intensive warnings and, if certain conditions are met, even claim damages.

## Implications on practice

What are the consequences? Companies working with influencers should conclude written agreements with the instagrammers to ensure that they comply with the legal requirements for identification of paid content by using clear terms that make the advertising nature of the post obvious, and by placing the terms visibly, in a suitable place.

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