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Liability of influencers for labelling violations

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Introduction

The Cologne Regional Court has reached a decision on influencer advertising in preliminary injunction proceedings.[(1)]

The legal framework for influencer advertising, in particular the scope of their labelling obligations, has occupied both the courts and the legislature for some time. Particularly noteworthy are three judgments of the German Federal Court of Justice (BGH) of September 2021, Influencer I, II and III.[(2)] In the meantime, the legislature has also adopted amendments to competition law provisions in this regard, which will come into force on 26 May 2022.[(3)]

Against this background, the present decision of the Court, which was issued shortly after the BGH rulings, is of particular interest.

Facts

A special feature of these proceedings was that they were not directed against an influencer herself but against her manager or agency, which managed profiles on social media. These profiles included a profile on a social media platform (presumably Instagram) with around 2 million followers and marked with a blue checkmark (ie, it was a verified profile). Several posts were published, showing the influencer dressed in various items of clothing. The profiles of the manufacturers of these clothes were linked by means of "tags". There was no labelling as a commercial publication (advertising or similar). The influencer and the defendant had not received any consideration from the manufacturers for this linking; rather, they had purchased the garments presented themselves.

Decision

The Court granted the applicant's application for an injunction against this conduct.

It would have been incumbent upon the defendant to mark the contributions as advertising. Failing to do so was an infringement of section 5a(6) of the German Unfair Competition Act (UWG), since the contributions were a commercial act with a commercial purpose that was likely to induce a consumer to make a commercial decision that they would not otherwise have made.

The Court assumed that the publication had a commercial purpose, referring to case law of the Higher Regional Court of Cologne. The defendant had not rebutted this presumption. For this reason, the Court affirmed a violation of section 5a(6) of the UWG insofar as the action was taken for the benefit of other companies. The defendant's conduct was also contrary to special media law provisions from the Telemedia Act (TMG), the broadcasting treaty (RStV) and the media treaty (MStV) because the commercial communication or advertising was not recognisable as such.

With regard to the advertising promotion of one's own company, which had also taken place through such posts, there was a direct violation of section 5a(6) of the UWG. According to the Court, the fact that the account managed by the defendant was marked with a blue checkmark did not indicate that all statements made on this profile also had a commercial background. A labelling obligation was therefore given.

Influencer decisions of BGH

Several points in the decision of the Court disregard decisive evaluations of the most recent influencer case law by the BGH.

Firstly, the BGH expressly clarified (contrary to the case law of the Higher Regional Court of Cologne cited by the Cologne Regional Court in the present case) that there is no presumption to be rebutted by the opposing party either with regard to the existence of a commercial act or with regard to the commercial purpose. According to the BGH, as is so often the case, it is also a matter of "an assessment of the entire circumstances of the individual case".[(4)]

According to the case law of the BGH, the media law provisions on advertising or commercial communication from the TMG, the RStV and the MStV are also special provisions. According to these regulations, the existence of advertising or commercial communication in favour of another company depends on a consideration of this other company for the contribution of the influencer. Only if a consideration was provided, the posts must consequently be marked as advertising. However, if no such consideration was provided, recourse to the provisions of section 5a(6) of the UWG is generally precluded in order not to undermine the special provisions of media law. The Court also failed to recognise this in its decision.

According to the BGH, something different can only be assumed in the case of self-promotion by the influencer. The influencer's own company is already regularly promoted by increasing the advertising value through such posts. In the Influencer II and III judgments, however, the BGH rejected a violation of section 5a(6) of the UWG with regard to commercial actions in favour of one's own company. This is because the commercial purpose of acting in favour of one's own company was clearly recognisable and could be derived directly from the circumstances. The following are decisive considerations for such an assessment:

- a significant number of followers;

- the number of "likes" that are awarded for individual posts; and
- a marking of the profile with blue checkmark.

It is precisely the blue checkmark that would indicate to the target audience that the profile is a business profile, which also indicates the commercial purpose of the posts published there.[(5)] In relation to this point, too, the decision of the Court again contradicts the principles established by the case law of the BGH.

It is therefore extremely doubtful whether the preliminary injunction of the Court, which was issued before the full text of the decisions of the BGH was published, will be upheld in the main proceedings or at a higher instance.

Comment

It should be said that the distinction made by the BGH between the provisions of unfair competition law in the UWG and the (tele)media law provisions on "commercial purpose", "commercial communication" or advertising should become obsolete in May 2022 at the latest when the reform of the law comes into force. The second sentence of section 5a(4 of the (new) UWG now also explicitly links a "consideration" to the determination of the "commercial purpose" of a business act for another company in German competition law.

However, this will not be a carte blanche for influencers, since the third sentence of section 5a(4) of the (new) UWG simultaneously introduces a presumption according to which it must be assumed that (in the case of services for the benefit of another entrepreneur) the acting entrepreneur (influencer) will have received remuneration or consideration. It will therefore be up to the influencer to rebut this presumption.

Particularly with regard to consideration of any kind received from companies, it is recommended that the contributions will be marked as advertising. No. 11 of the Annex to section 3(3) of the UWG also prohibits advertising disguised as information. Here, too, financing by an entrepreneur is required. The European Court of Justice recently clarified in this context that the monetary consideration required for this must be interpreted broadly.[(6)] On the one hand, there is no lower limit in terms of value; on the other hand, the presence of goods or services received can also be sufficient – such as in the specific case of the free provision of pictures protected by rights of use when the business premises of the entrepreneur and the goods offered are visible.

Furthermore, it should be noted that recommendations for the purpose of self-promotion may still be subject to labelling under unfair competition law. This is expressly clarified in the explanatory memorandum to section 5a(4) of the (new) UWG.[(7)] The principles of the cited BGH case law will probably have to continue to be applied here.

Nevertheless, the latter could lead to a situation in which influencers who have neither a profile that is verified with a blue checkmark nor a seven-digit number of followers possibly face being subject to stricter labelling requirements for unpaid posts than their more successful colleagues.

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Endnotes

(1) Cologne Regional Court, decision dated 14 September 2021, file No. 31 O 88.

(2) Influencer I (I ZR 90/20), Influencer II (I ZR 125/20) and Influencer III (I ZR 126/20).

(3) Act to Strengthen Consumer Protection in Competition and Trade Law of 10 August 2021.

(4) Influencer I decision, paragraph 73.

(5) Influencer II paragraph 34 et seq.

(6) Judgment of 2 September 2021 C-371/20.

(7) BT-Drucks 19/27873, p 35.