

IP-FLASH

Influencer Marketing: Developments and Current Status

No Duty to Label Obvious Self-Promotion – A German Court Ruling and a Look Back at Switzerland

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1. Background

An influencer is a person who has built up a substantial following on online platforms (Instagram, YouTube, TikTok, etc.) through content that often comes across as personal, and who, based on this reach and perceived credibility, can specifically influence the opinions, purchasing decisions, or behaviour of their audience – usually on behalf of, or in the commercial interest of, companies whose products or services they present.

A recent ruling by the Hamburg Higher Regional Court (OLG Hamburg) confirms that influencers are not necessarily required to label their own brand advertising as “advertising” where the commercial purpose is obvious in any event. This is a good opportunity to update the Swiss legal position and briefly compare it with the German ruling.

2. The Ruling: OLG Hamburg, judgment of 21 May 2026 – 15 U 99/24

A German association for combating unfair competition sued a well-known Instagram influencer with 9.3 million followers and a verified account. Two classic social-media-law issues were at stake: 1) the absence of a complete legal notice (Impressum) directly on the Instagram profile, and 2) the failure to label a post as advertising in which the influencer presented products from her own cosmetics/hair-care brand. Both the Hamburg Regional Court and the Hamburg Higher Regional Court dismissed the German association’s claim.

Key Finding 1 – A Legal Notice via a Bio Link Is Sufficient

A visually prominent link placed directly beneath the Instagram bio to an external legal notice satisfies the requirements for a legal notice that is “*easily recognisable, directly accessible, and permanently available*” (Impressum). The average user expects to find it via such a link.

Key Finding 2 – Exception for Obvious Self-Promotion

Where a well-known influencer recognisably promotes her own brand, the commercial purpose may already be immediately apparent from the circumstances – a separate label such as “advertising” or “ad” is then dispensable in such cases (§ 5a para. 4 UWG-D). In the case at hand, the following factors were decisive in particular:

- a verified account (“blue checkmark”) as an indication of high public recognition;
- self-description as “founder” of the brand in the bio;
- a clear brand designation (“... by ...”) in the post;

- typical advertising language (sales signals, ordering and shipping information).

According to the ruling, what remains decisive is always an overall assessment of the account's and the post's design; there is no schematic labelling obligation for every post. The ruling falls in line with the approach established since the earlier Federal Court of Justice (BGH) decisions "Influencer I/II" (2021) and confirms that obvious recognisability of an advertising character renders a specific advertising label unnecessary.

3. The Swiss Perspective

Unlike Germany, Switzerland has no special statutory labelling rule for influencer marketing. What remains decisive is the general clause of Art. 2 UWG together with the prohibition of deception under Art. 3 para. 1 lit. b UWG, as concretised by the – legally non-binding – principles of the Swiss Fairness Commission ("**SLK**"), namely Principle B.15 (labelling obligation in the case of payment or a comparable benefit in kind).

Similar provisions (e.g. on the prohibition of non-transparent surreptitious advertising) also exist under the Swiss Radio and Television Act ("**RTVG**"), although these generally do not apply to non-linear YouTube or Instagram channels.

Swiss legal doctrine and literature took up the subject of influencer marketing from around 2017 onwards. Various contributions took the view that non-transparently labelled advertising can be unlawful under the general clause of Art. 2 UWG. Legal doctrine derived this from a "separation requirement" between editorial content and advertising, irrespective of any actual financial compensation to the YouTuber. Compensation received by the influencer was regarded only as an indication, not as a precondition, of unfairness¹. At the time, the relevant points of reference were the (unchanged since April 2008) self-regulatory principles of the Swiss Fairness Commission on fair commercial communication (nos. 3.1–3.12: commercial communication must be "recognisable" and "labelled") as well as a decision of the Swiss Press Council of June 2017 concerning the online portal watson.ch: the label "presented by" used there to indicate the sponsoring company was found insufficiently transparent, with "paid by" recommended instead. Broadcasting law (Art. 9 et seq. RTVG), with its strict separation requirement between editorial content and advertising, was generally classified as inapplicable to non-linear online offerings (YouTube, social media), which meant that direct regulatory sanctions by OFCOM (BAKOM) remained excluded.

Many practitioner publications recommended that companies in Switzerland adopt clear labelling practices ("advertising", "ad", "paid by"), impose contractual compliance obligations on commissioned influencers, and remain aware that responsibility can fall not only on the influencers

¹ See e.g. MISCHA SENN, Influencer-Marketing und die Rechtswirklichkeit, in: Jusletter, 16 December 2019; VALENTINA SRBAKOSKI, Influencer Marketing auf Instagram, in: Jusletter, 22 May 2023; SANDRA HANHART/ALAIN SCHMID, Das Trennungs- und Kennzeichnungsgebot bei Beiträgen in sozialen Medien, in: sic!, 2019, 353 et seq.; DIRK SPACEK, Digital Influencer Marketing – Worldwide Legal Developments and Switzerland, in: Walder Wyss Newsletter No. 119, October 2017.

themselves but also on the commissioning companies and, at times, the platforms – as joint infringers within the meaning of the UWG².

This basic framework – i.e., the general clause in the UWG plus self-regulation by the SLK (whose findings are often followed by state courts), together with the absence of a special statutory rule – remains unchanged to this day. What has changed and become more concrete since then, however, is the case practice, above all the SLK's case practice: in several complaint proceedings brought by the Foundation for Consumer Protection against prominent influencers, a labelling obligation for advertising was denied because the private character of the post (unprofessional shot, recognisable tourist photo, no reference to a company visible in the background) predominated in the overall impression. A consistent line cannot yet be discerned from the SLK's practice, however.

1. The “Mäder” Case – SLK, Decision of 6 May 2020 (2nd Chamber)

The influencer “Mäder” posted a photo on Instagram showing himself in the foreground; in the background – poorly lit and only partially visible – a screen/shopfront of a textile manufacturer can be made out. He made no reference to the company in the caption. The Foundation for Consumer Protection filed a complaint over this. The applicable standard was Principle No. B.15 para. 1 of the SLK Principles: commercial communication is unfair if it is “not clearly recognisable as such and not clearly separated from the rest of the content”. For the understanding of the target group, the “averagely perceptive, averagely informed and averagely aware” addressee is decisive (Principle A.1 para. 3, with reference to BGE 132 III 414 E. 2.3.2).

The Commission relied on the overall impression and regarded the following as decisive: the poor image quality/lighting (unprofessional character), the clear recognisability as an ordinary tourist photo, the merely incidental visibility of the shop in the background, and the complete absence of any textual reference to the company. Mäder's statement that he had no cooperation with the brand visible in the picture was found credible by the Commission.

The post was classified as unambiguously private communication – no labelling obligation³.

The “Five-Celebrity Series” 2019/2020

The Foundation for Consumer Protection simultaneously filed complaints against five prominent Instagram users: Roger Federer, Xenia Tchoumitcheva (“Tchoumi”), Michelle Hunziker, Jolanda Neff, and Iouri Podladtchikov – in each case over “*unlabelled*” commercial posts. The SLK upheld the complaints against Podladtchikov and Neff – one commercial post each without an advertising label. Sara Stalder (Managing Director of Consumer Protection) told SRF that this created “clarity” for influencers. The Third Chamber of the SLK dismissed the complaint against Michelle Hunziker.

² See e.g. DIRK SPACEK, op. cit., and HANHART/SCHMID, op. cit.

³ See <https://www.faire-werbung.ch/de/entscheide>; SLKE, 6 May 2020, 2nd Chamber on legalis.ch; see also LUKAS BÜHLMANN/NICOLA BENZ, OLG Hamburg zum Influencer-Marketing: offensichtliche Werbung muss nicht gekennzeichnet werden, MLL News Portal, 10 September 2020.

In a post, she had tagged, via hashtag, the crew and businesses that had helped with a music video shoot (only 3 of 15 hashtags linked to businesses at all). The SLK found that the hashtags had not been particularly highlighted and contained no advertising statements. Simply thanking those involved was, it held, customary for such a production⁴.

Roger Federer's post (a professional advertising video with a visible sponsor logo) was judged to be so obviously commercial that no additional labelling was necessary. In Tchoumi's case (a jewellery post), the SLK argued that her entire account was commercial in nature, so the post did not need to be separately labelled; her objection that she had no cooperation agreement with the brands shown was not accepted by the Commission – it is, it held, part of an influencer's strategy to promote brands even without an existing contract, in order to pave the way for future collaborations⁵.

The SLK plenary session (all chambers together, meeting only twice a year) dismissed Consumer Protection's appeals against the Federer and Tchoumi decisions – appeals succeed only in the case of arbitrariness; there is no fundamental reassessment on the merits. A further, new (second) complaint against Jolanda Neff (concerning the sharing of a credit-card-company post) was not decided on the merits because Neff accepted the complaint from the outset. In its statement, the SLK emphasised that every complaint had to be "assessed in a differentiated and independent manner"; a certain number of further cases would still be needed for a "settled practice" to emerge. In the course of this, it also once again clarified SLK Principle B.15. It made clear that the wording was too narrowly drafted for classic media with an editorial section that must be kept separate from an advertising section (print, radio, television). SLK spokesperson Thomas Meier, for instance, told the *SonntagsZeitung*: "*It makes no difference to us in which medium content or commercial communication is published*"⁶, meaning that every medium, offline and online, that produces content must comply with SLK Principle B.15.

Reactions from Consumer Protection and the Public

The SLK's decisions were criticised in public as incoherent. No clear criterion for influencer marketing was said to be discernible. The subject was also taken up politically in 2024: a motion (24.3257) called for a new statutory basis for the declaration of influencer advertising. The Federal Council rejected this in January 2025. It held that influencer advertising was already covered by Art. 2 and Art. 3 para. 1 lit. b UWG, referred to the existing SLK practice, and did not identify legal uncertainty serious enough to justify a fundamental change in the law. It thereby implicitly

⁴ SLK, leading decision of 11 September 2019, 1st Chamber, complaint proceedings No. 154/19 (and 159/19), also published in *sic!*, 2019, 716 et seq.

⁵ See also www.werbewoche.ch/persoendlich.com, 28 May 2020.

⁶ See at www.faire-werbung.ch/de/rekurse-gegen-die-influencer-marketing-entscheide/ www.markt-kom.com, 17 November 2019.

confirmed that advertising that is already clearly recognisable does not need to be separately declared again⁷.

A distinct Swiss *court* practice on the influencer labelling obligation is – unlike in Germany – still not apparent to this day. Its concretisation takes place informally, through self-regulation via the SLK (and, e.g., the Press Council in the press context).

Conclusion: Does the German Ruling Change Anything About the Swiss Assessment?

Formally, no: German case law does not bind Swiss courts, and the legal bases differ structurally (a codified exception under § 5a para. 4 UWG-D versus an open general clause plus self-regulation in Switzerland).

In substance, however, the ruling confirms an evaluation that has been developed in Switzerland, in functionally the same way, through SLK practice and the Federal Council's statement of January 2025: what is decisive on both sides of the border is *whether the commercial purpose is directly recognisable to the average addressee from the circumstances or not*. The German ruling offers no new concept, but it does provide a precise set of criteria for the “own-brand case”. By way of comparative law, it could plausibly also be drawn on in a submission to the Swiss SLK or in legal advice. At the same time, it confirms that the “*recognisability aspect*” is not a German peculiarity but an internationally plausible approach within unfair-competition law.

This short publication is for general information purposes only and does not replace legal advice in an individual case.

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⁷ See <https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20243257>. See also: Nicole Beranke Zanon/Crinna Stubenvoll, Influencer-Werbung ist auch Werbung, <https://haerting.ch/wissen/influencer-werbung-ist-auch-werbung/>.