

Guideline of the Media Authorities

Advertising Identification of Social Media Offers

Note: The present English version is a translation and serves for demonstration purposes only – the original German version remains the only decisive one, *in particular the German terms to indicate the presence of commercial communications.*

Introduction

This guideline is a continuation of the previous FAQs of the Media Authorities. It contains basic help and regulations on the identification and separation obligations for advertising on social media platforms such as Instagram, Twitter, Facebook, YouTube, Twitch, and similar providers as well as other Internet pages. It focuses on questions of media law, but does not exclude competition law.

The separation and identification of advertising serves to preserve the freedom of media and expression, the independence and integrity of media offers, the credibility and

authenticity of the providers and protection of users from misleading content. It is governed by the Telemedia Act (TMG) and the Rundfunkstaatsvertrag (RStV) [Interstate Broadcasting Treaty].

What does this mean for individual social media offers? How is an identification of this nature to be implemented under media law? This guideline provides the necessary assistance to help answer these questions.

Regarding the standards for separating and identifying advertising, legislation distinguishes between video offers, photo offers, and text offers.

For video offers, the separation and identification provisions of Art. 7 and 8 RStV apply respectively (see Art. 58 (3) RStV). For simple photo/text offers, Art. 58 (1) RStV and Art. 6 para. 1 sentence 1 TMG apply. Furthermore, the youth media protection requirements of Art. 6 Jugendmedienschutz-Staatsvertrag (JMStV) [Interstate Treaty on the protection of Minors] must also be taken into account. Advertising may not affect children and adolescents physically or mentally, or exploit their inexperience and credulity with direct purchase appeals.

The guideline of the Media Authorities on the advertising identification of social media begins with an identification matrix.

This makes it clear at first glance whether identification is necessary for the respective offer and how this must be done. In addition to the matrix, there are explanations that concretise and clarify the terms and demarcation cases.

The guide replaces the previous FAQs of the Media Authorities. It is regularly adapted to the developments of social media offers and case law.

IDENTIFICATION MATRIX SOCIAL MEDIA

Page 1/2		Is identification necessary?	Type of identification?			Place of identification?		
	Content 	Yes or no 	Video (YouTube, Facebook etc.) 	Photo /Text (Instagram, Facebook, Twitter etc.) 	Blog 	Video (YouTube, Facebook etc.) 	Photo /Text (Instagram, Facebook, Twitter etc.) 	Blog 
A	Contributions about products, services, brands, companies, regions, events, trips that are published for a return service.	yes	a) Product plays the <u>main role</u> : clearly legible “Werbevideo” or “Werbung” [that means advertising video or advertising] b) Product plays a <u>supporting role</u> : “Produktplatzierung” or “Unterstützt durch Produktplatzierung” or “Unterstützt durch <Produktname>” ¹	Clearly legible “Werbung” or “Anzeige” [that means advertising or ad]	Clearly legible “Werbung” or “Anzeige” [that means advertising or ad]	a) As a permanent fade-in <u>on the video</u> b) At the beginning of the video	At the beginning of the post	At the beginning of the blog post
	1		2/3	3			4	4
B	Contributions about products, services, brands, companies, regions, events, trips that were obtained free of charge, but whose publication is subject to agreements/ conditions.	yes	a) Product plays the <u>main role</u> : clearly legible “Werbevideo” or “Werbung” [that means advertising video or advertising] b) Product plays a <u>supporting role</u> : “Produktplatzierung” or “Unterstützt durch Produktplatzierung” or “Unterstützt durch <Produktname>” ¹	Clearly legible “Werbung” or “Anzeige” [that means advertising or ad]	Clearly legible “Werbung” or “Anzeige” [that means advertising or ad]	a) As a permanent fade-in <u>on the video</u> b) At the beginning of the video	At the beginning of the post	At the beginning of the post
	1		2/3	3			4	4
C	Contributions about products, services, brands, companies, regions, events, trips that are published from one’s own motivation without the commercial incentive of third parties.	generally no (warning! Trap: overly positive representation)						
	5	5						

¹ [that means “Product Placement” or “supported by product placement” or “supported by <product name>”]

Page 2/2		Is identification necessary?	Type of identification?			Place of identification?		
	Content 	Yes or no 	Video (YouTube, Facebook etc.) 	Photo/Text (Instagram, Facebook, Twitter etc.) 	Blog 	Video (YouTube, Facebook etc.) 	Photo/Text (Instagram, Facebook, Twitter etc.) 	Blog 
D	Contributions/presentations on one's own products, services, brands, companies – with ownership that is apparent for users.	generally no (warning! Trap: overly positive representation)						
	6	5						
E	Contributions/presentations on one's own products, services, brands, companies – without one's ownership apparent to users.	yes	a) <u>Product plays the main role</u> : clearly legible “Werbevideo” or “Werbung” [that means advertising video or advertising] b) <u>Product plays a supporting role</u> : “Produktplatzierung” or “Unterstützt durch Produktplatzierung” or “Unterstützt durch <Produktname>” ¹	Clearly legible “Werbung” or “Anzeige” [that means advertising or ad]	Clearly legible “Werbung” or “Anzeige” [that means advertising or ad]	a) As a permanent fade-in <u>on the video</u> b) At the beginning of the video	At the beginning of the post	At the beginning of the post
	6		2/3	3				
F	Affiliate links	yes	Symbol (*) + explanation	Symbol (*) + explanation	Symbol (*) + explanation	Close to the link	Close to the link	Close to the link
			7	7	7			
G	Advertising links	yes	Clearly legible “Werbung” [that means advertising]	Clearly legible “Werbung” or “Anzeige” [that means advertising or ad]	Clearly legible “Werbung” or “Anzeige” [that means advertising or ad]	Before/during link/product reference	Close to the link / product reference	Close to the link / product reference
	8							
H	Links/tags to friends, source references, one's own products, brands, companies, services	generally no (warning! Trap: overly positive representation)						
	8	5						
I	Discount codes	yes	Clearly legible “Werbung” [that means advertising]	Clearly legible “Werbung” [that means advertising]	Clearly legible “Werbung” [that means advertising]	Close to the discount code/link	Close to the discount code/link	Close to the discount code/link
	8							

¹ [that means “Product Placement” or “supported by product placement” or “supported by <product name>”]

Explanation of the Identification Matrix Social Media



1 Any reference to or presentation of products, brands, services, companies, regions, events, travel, etc., based on an agreement/cooperation is always considered advertising. It does not matter whether the reference to or presentation of items is for a fee or a similar consideration. A consideration (monetary benefit) is, for example, also the assumption of travel costs or invitations to events.

2 A main role is played by the product when the entire video is about the product. The product is the reason for the video and the central focus point thereof.

If a product is only mentioned or depicted in short scenes, the product only plays a supporting role. The product does not determine the content of the video and is more or less casually integrated into the video without the commercial purpose being recognizable in the foreground.

Warning: Also in the supporting role, it is not allowed to one-sidedly and intensively push the product into the foreground.

Advertising identification should be clearly legible and recognisable. An unclear, small, or transparent font identification in the corner of a video is thus not sufficient.

3 According to the Media Authorities, the advertising identification tools provided by YouTube, Instagram and Facebook (“Contains paid promotion”, “Paid partnership with ...” or “Paid”) alone are not enough to clearly mark the advertising character of a post/contribution. These tools can be used in addition to the abovementioned advertising identification. On German-language channels/accounts, the English-language identification terms (e.g. “ad”, “sponsored by”, or

“PR sample”) are not sufficiently clear as advertising identification according to the Media Authorities.

4 Users must be able to see that the post is an advertisement at first glance. For this reason, advertisements must already be marked clearly at the beginning of a text with the word “Werbung” or “Anzeige”, i.e. in a blog environment above or below the title of the blog.

The article summary shortens presented or linked texts (teasers/hooks), which have been created in cooperation with companies; these must also be identified with the term “Werbung” or “Anzeige”. Otherwise, the reader cannot recognise that when selecting an (alleged) editorial article, he/she will be directed to a text with advertising content.

5 If there is no cooperation with a company, the mention and presentation of products, etc., that have been purchased, rented or leased by oneself does generally not constitute advertising.

This especially concerns the presentation of products with advantages and disadvantages (e.g. information videos, reviews), but also a positive product presentation arising from self-interest instead of economic reasons and without advertising intent.

Warning: Advertising intention can be assumed if the product or service is presented and advertised in a manner that gives an objective viewer the impression that sales of the item are being promoted.

Indicators can be, for example, a very positive presentation, request to purchase, always addressing the same products/services/brands, no occasion

for publication, mention of prices and sources of suppliers, combination with affiliate links.

Note: Some competition courts (e. g. LG Heilbronn, judgment decision from 08.05.2018 - ref.: 21 O 14/18 KfH and LG Berlin, judgment decision from 24.05.2018 - ref.: 52 O 101/18) deemed tagging brands (especially links to Instagram accounts of fashion companies) on Instagram posts as a “business action”. The absence of the required identification was assessed as an anticompetitive violation. For the courts it was irrelevant whether the products were shown in the framework of a cooperation, whether they were made available to the Instagrammer free of charge or for a fee payment, or whether they were purchased by the Instagrammer himself/herself and then displayed and tagged. The competition courts saw a promotional component in the link to the commercial Instagram accounts of fashion companies.

6 Purely commercial social media offers, which are clearly recognisable as such, do not require an advertising identification. Clearly recognisable commercial channels are, for example, the channels of well-known brands, online shops, or channels from whose name the commercial activity is ascertainable. Notes and links to one’s own products or services in social media offers that are not clearly identifiable as commercial channels and which contain other content in addition to the presentation of one’s own products must be marked as advertising. If one’s own products are not thematised and linked, i. e. they merely appear as an accessory in the background, the Media Authorities do not think that advertising identification is required. This also applies to notes that are directly related to a practiced profession (e. g. a text of a musician about his/her current CD, a text of an actor about /his/her new film).

7 A possible explanation for affiliate links could have the following form: “Die mit * gekennzeichneten Links sind sogenannte Affiliate Links. Kommt über einen solchen Link ein Einkauf zustande, werde ich mit einer Provision beteiligt. Für Dich entstehen dabei keine Mehrkosten. Wo wann und wie Du ein Produkt kaufst, bleibt natürlich Dir überlassen.” [that means “The links marked with * are so-called affiliate links. If a purchase is made via such a link, I will receive a commission. There are no additional costs for you. Where, when, and how you purchase a product is of course up to you.”].

8 Links to commercial websites as well as discount codes must also be marked as advertising because the user must know before clicking on the link that there will be advertising on the following website. In the case of uncommented links (for example, to the photographer who took the

pictures) or when the technical equipment used is mentioned (for example, camera, editing program), the Media Authorities generally see no need for an advertising identification. For hashtags that contain company names or image tags for brand accounts, provided that they are actually integrated as editorial references, there is no need for an advertising identification. The same applies to tagging friends or the visibility of brands.

Imprint

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