

Influencer marketing – is '#collaboration' clear enough?

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The debate regarding hidden marketing by influencers has been ongoing for some time, as social media's influencer scene grows from strength to strength. The question of how influencer marketing should look to fulfil the requirements of marketing law has previously been discussed in different guidelines and by industry self-regulatory organisations, but this judgment is the first from a judicial court in Sweden.

Background

The influencer behind one of Sweden's most well-read blogs advertised a service for returning old mobile phones on her blog and Instagram account. A company acted as an intermediary between the marketed service provider and the influencer. The company was also responsible for the blog's technical platform and provided server space for the blog.

The marketing consisted of three posts – two on the blog and one on Instagram. The first blog post included text presenting the marketed service, three pictures of the influencer and, at the end of the post, the Swedish phrase '*I samarbete med*' (which in English means 'the post is in collaboration with'), without further reference to the company that it was in collaboration with. The second blog post was identical to the first, but it had been edited by the intermediary to include a lightly coloured field in which 'sponsored post' was written, placed between the headline and body of the text. It also included a reference to the marketed service provider at the end of the post. The Instagram post included a picture of the influencer holding a mobile phone and a short piece of text with '#samarbete' (which in English means 'collaboration') at the end of the six-line message.

The Consumer Agency requested that the court issue injunctions based on unfair marketing practices against the influencer (addressed to her limited liability company) and the intermediary. It alleged that:

- the influencer gave the appearance that she acted as a regular person or consumer;
- the advertisement was not clearly identifiable as marketing; and
- the advertisement did not clearly state which entity was responsible for the marketing.

It also alleged that the intermediary was liable for complicity in the unfair marketing.

Decision

The court began by stating that influencers can make recommendations through their channels, both with and without having received compensation (only the former constitutes marketing under the Marketing Act). Companies marketing their products or services through influencers generally ask for the advertisement to be written in the same tone as the influencer's usual content. Because followers develop a relationship to the influencer, they are more likely to be affected by marketing through these channels than by other, more traditional types of advertisement. Consequently, the

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court held that marketing posts must clearly state that they are advertisements, and that such notice must be given a prominent place in the post. The consumer must be able to identify the post as marketing at a cursory reading.

In its assessment of the average consumer, the influencer and intermediary had referred to Google Analytics statistics showing that:

- 95% of readers were between 18 and 34 years old;
- 95% of readers were women; and
- 90% of visits to the blog were made by recurring readers.

Even though there were some uncertain factors regarding the statistics (including that about 30% of logged readers had not been successfully age determined), the court held that it strongly supported that the average consumer was a female aged between 18 and 34 years and a recurring visitor. Moreover, it held that the same persons generally followed both the blog and the Instagram account and that most of the followers were experienced social media users. The average consumer was considered to be slightly more attentive in perceiving marketing in social media.

Turning to the assessment of the marketing, the court referred to several guidelines regarding online marketing provided by the International Chamber of Commerce, the Swedish Consumer Agency and other industry organisations. The court also noted that according to market surveys, consumers found the phrases 'in collaboration with', 'sponsored post' and '#collaboration' to be a clear indication that the post contained marketing. However, for the marketing to be fair, the court concluded that consumers must be able to identify the post as marketing at a cursory reading and then to choose whether to read the whole post.

In the first blog post, the information that the post was sponsored was given at the end. It was written in a small font which did not differ from the rest of the content. Readers therefore had to read the whole post or scroll to the end to get this information. For these reasons, the court found that the post was not clearly identifiable as marketing. In contrast, the second blogpost contained a coloured banner labelled 'sponsored post' directly under the headline. Here, the court found that the average consumer would immediately identify the post as marketing. Regarding the Instagram post, the court noted that Instagram does not offer the same range of design choices (eg, fonts and colours) as a blog, which should be given some consideration. However, consumers must still be able to identify the post as marketing at a cursory reading and be able to choose not to read it. Stating '#collaboration' at the end of the post was considered insufficient. Moreover, it did not contain sufficient information regarding the company behind the marketing, since there was no such information in the hashtags used. Consequently, the court found that the first blog post and the Instagram post constituted unfair marketing.

Regarding liability, the court noted that the company whose services were marketed had the principal responsibility for the marketing. The influencer had been actively involved in designing and publishing the marketing. However, the marketing was not made to promote the influencer's interest and the influencer was not involved in the actual marketed offer. Therefore, the court found that the influencer could be held liable only for complicity and issued an injunction against her company.

Assessing the intermediary's liability, the court concluded that the intermediary had negotiated the deal between the influencer and the service provider. It had also contributed to the wording of the marketing by providing a draft blog post and notes on the influencer's revised draft. It did not, however, have any final approval rights regarding the wording or layout. The intermediary also provided the technical platform for the blog, acted on behalf of the influencer in her initial contacts with the Consumer Agency and developed a technical solution to make it easier for the influencer to mark content as marketing. However, the court found that this was insufficient to hold the intermediary liable and issue an injunction against it.

Comment

The court's conclusion that the indication that a post constitutes marketing must be made at the very beginning of the post is perhaps unsurprising, as it is based on an established principle that the

consumer must be able to identify marketing before he or she has read the entire advertisement.

It is interesting to note the rather narrow definition of the 'average consumer' based on the statistics provided by the defendants. This appears to be a narrow definition of what could have been expected, but it may be a result of how the parties presented their arguments. Companies that are active in digital media should remember that data regarding actual users may be useful when arguing a certain definition of the average consumer and keep such information handy. It would not be recommended to over rely on being able to define the average consumer as narrowly as in these proceedings without good grounds.

Even though the intermediary between the influencer and the company that bought the advertisement space had taken several measures regarding the wording of the advertisement and had been active in providing the technical platform, it was not held liable for the unfair marketing. Thus, it appears that it may be difficult to obtain injunctions against such intermediaries if this finding stands on appeal.

Companies that engage influencers as part of their marketing strategies should keep in mind that they are ultimately, and primarily, responsible for the content and presentation of the marketing statements made by the influencer. Even though the Consumer Ombudsman chose to target the influencer and intermediary, this was a pilot case. Companies should therefore be careful to ensure that they have final say regarding the wording and design of advertisements or that the agreement with the influencer imposes sufficient obligations on the influencer to include a clearly visible reference to the collaboration or sponsorship at the beginning of the posts. It may also be insufficient to use '#collaboration' without stating with which company the collaboration takes place.

Finally, it is worth considering that the case was decided on the specific facts relied on in those proceedings. While this included market surveys on the perception of words such as '#collaboration', the legality of all marketing is made on a case-by-case basis. As such, it is important to consider how a brief contact with the post could be interpreted by different consumers – for example, '#collaboration' does not necessarily mean that it is a paid or commercial collaboration. The Consumer Agency has appealed the judgment against the intermediary and it remains to be seen whether the appellate court shares the Patent and Market Court's view.

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