

7-12-2021

#OMG - Omissions As Media Gaffes: Endorsements in Social Media Advertisements and Influencers' Disclosure Obligations

Maximillian Plail

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#OMG – OMISSIONS AS MEDIA GAFFES:

ENDORSEMENTS IN SOCIAL MEDIA ADVERTISEMENTS AND
INFLUENCERS' DISCLOSURE OBLIGATIONS

MAXIMILIAN PLAIL*

ABSTRACT

Court decisions in Germany tend to draw little media interest, but an exception to this comes in the form of decisions relating to disclosure obligations on social media, such as the recent case involving Cathy Hummels. Due to enforcement issues and the paucity of damages awarded to individual and companies, there is a significant lack of literature on this field of law. As a consequence, this study, which compares the U.S. and Germany while also proposing how, exactly, the law needs to change, is unique. Hardly any other area of law is home to this much ambiguity that affects such a large number of people, and as a result, the present legal situation cannot be allowed to continue. Neither advertisers, influencers, nor social media platforms know what, and in particular, how, they are supposed to disclose their connections to companies, nor do social media users know what they can expect from posts they see on the internet.

After an overview of the entire field, a comparison between the German system and the U.S. system, with its larger market, reveals that American law suffers from similar gaps as German law. The most pressing issues are that, in Germany, it is not clear when disclosure needs to be

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made, while the extent of a disclosure needs to be clarified in both systems. A proposal to balance the freedom of influencers with the risk of misleading social media users is put forward, in a form that would enable it to be added to existing legislation. In both systems, social media platforms would have to provide a visual tool, like a frame or button, which would have to be used by influencers. This would enable social media users to easily distinguish between sponsored content and content that has no connection to an advertiser while scrolling through posts and without having to look at the content of the post itself. In Germany, a definition would be amended to trigger the disclosure obligation only if the post represents a direct commercial benefit for the influencer, such as a paid relationship or the initiation of a contract.

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INTRODUCTION

Cathy Hummels is not only well-known as the wife of soccer world champion Mats Hummels she is also a famous influencer in Germany. As of November, 2020, more than 580,000 Instagram users follow her account,

seeing every single photo she uploads as she shares her daily life.¹ The sheer scale of this market is exemplified by a comparison to Germany's most-followed influencer, Pamela Reif (7.9 million followers), and the world's most popular account, Cristiano Ronaldo (304 million followers).² An audience of this size gives rise to a huge market of potential customers, creating the perfect opportunity for companies to advertise their products and services. The scale and importance of advertisements on social media and Cathy's fame explain why, in 2019, there was a great deal of media attention when she was sued by the VSW, a German organization that campaigns for social competition. They claimed that she had infringed Germany's Act against Unfair Competition by uploading several pictures showing various products and trademarks.³ The issue at hand was that she had neither linked the company that owned the brand nor disclosed that the post was an advertisement. In this case, the sticking point was that Cathy had not actually received any money, and there were no contracts for her advertisements.⁴

The German courts had not issued a judgement on a matter like this before: in this field, the question of jurisdiction, if it applies at all, and the German Act on Unfair Competition is as ambiguous as it is controversial.⁵ The Act does not provide any resolution in this regard.⁶ More generally, German legislation poses a host of difficulties when it comes to dealing with advertisements, especially concerning social media. The key problem in this area is not usually the question of whether disclosure is required, as in this very specific case. Instead, there is a greater need for answers to the

1. *Münchner Hochzeit in Gelb: Mats Hummels und Cathy Fischer haben geheiratet*, FOCUS ONLINE (June 16, 2015, 1:10 PM), https://www.focus.de/panorama/boulevard/fussball-mats-hummels-und-cathy-fischer-haben-geheiratet_id_4752836.html; Cathy Hummels (@cathyhummels), INSTAGRAM, <https://www.instagram.com/cathyhummels/> (last visited Aug. 14, 2020).

2. *The Most Followed Instagram Profiles*, TRACKALYTICS.COM (Nov. 11, 2020) <https://www.trackalytics.com/the-most-followed-instagram-profiles/page/1/>.

3. *Wir über uns*, VERBAND SOZIALER WETTBEWERB, <http://www.vsw.info/00000098fd0d98b0b/index.html> (last visited August 14th, 2020); *See, e.g.*, Tobias Lill, *Cathy Hummels vor Gericht: Dieses Urteil ist für Uns!!!*, SPIEGEL ONLINE (April 29th, 2019, 7:16 PM), <https://www.spiegel.de/wirtschaft/soziales/cathy-hummels-vor-gericht-dieses-urteil-ist-fuer-uns-a-1265015.html>.

4. *See, e.g.*, *Cathy Hummels gewinnt Prozess um Schleichwerbung*, SPIEGEL ONLINE (April 29th, 2019, 11:22 AM), <https://www.spiegel.de/wirtschaft/service/cathy-hummels-instagram-star-gewinnt-prozess-umschleichwerbung-a-1264899.html>

5. Gesetz gegen den unlauteren Wettbewerb [UWG] [Act Against Unfair Competition] Mar. 3, 2010, BGBl I at 254 (Ger.) [hereinafter *UWG*].

6. *See, e.g.*, Christian Solmecke, *OLG München zu Influencern: Erneuter Sieg für Cathy Hummels*, WILDE BEUGER SOLMECKE RECHTSANWÄLTE (June 25, 2020), <https://www.wbs-law.de/it-und-internet-recht/influencerin-cathy-hummels-urteil-des-lg-muenchen-24154/>.

question as to how and to what extent, information should be disclosed.⁷ The fast-changing media landscape leaves systems struggling to keep up, meaning that influencers do not know how they are supposed to behave, and social media users do not know what to expect from particular posts. Unfortunately, the judgement issued by the Munich Regional Court did not provide the clarity expected.⁸ Although the judge stated, that the defendant, Cathy, was pursuing commercial interests, she won the case and the action was dismissed,⁹ because the court construed that with this number of followers, the average social media user would assume there was commercial intent.¹⁰ This contradicts former cases and does not provide guidance as to whether, and to what extent, influencers have to mark posts as advertisements, leading to further confusion.¹¹ In late June 2020, the judgement was approved by the Court of Appeal.¹²

Similar problems also occur in the larger U.S. market, causing enforcement issues to arise. Although various organizations, including the Federal Trade Commission (“FTC”), have developed disclosure requirements and provided guidelines, such as the FTC’s endorsement guidelines within the U.S. system, influencers are still unsure as to whether a non-suggested hashtag or a non-recommended location count as proper disclosure of their advertisement.¹³ Furthermore, as mentioned above, enforcement is difficult in the U.S. because of its complicated system of numerous organizations and codes. But it is even more difficult in the German system, which imposes tight restrictions in terms of who can be a

7. See Christina-Maria Leeb; Marc Maisch, *Social-Media-Stars und -Sternchen im rechtsfreien Raum*, ZUM 2019, 29 (2019), available at <https://beck-online.beck.de/?vpath=bibdata/zeits/ZUM/2019/cont/ZUM.2019.29.1.htm> (Ger.).

8. See, e.g., *Instagram-Star Cathy Hummels: Influencerin gewinnt Prozess um Schleichwerbung*, MANAGER MAGAZIN (Apr. 29, 2019, 11:20 AM), <https://www.manager-magazin.de/digitales/it/cathy-hummels-influencerin-gewinnt-prozess-um-schleichwerbung-a-1264927.html>.

9. See, e.g., *Landgericht München hat entschieden: Cathy Hummels gewinnt Prozess wegen Schleichwerbung*, FOCUS ONLINE (Apr. 29, 2019, 2:08 PM), https://www.focus.de/kultur/vermischtes/landgericht-muenchen-hat-entschieden-cathyhummels-gewinnt-prozess-wegen-schleichwerbung_id_10646321.html.

10. Landesgericht München I [LG] [Regional Court] April 29th, 2019, *Gewerblicher Rechtsschutz und Urheberrecht Rechtsprechungs-Report* [GRUR-RR] <https://rsw.beck.de/aktuell/meldung/lg-muenchen-i-weist-klage-gegeninfluencerin-cathy-hummels-um-produktpostings-auf-instagram-ab>.

11. See, e.g., Lill, *supra* note 5.

12. See generally *OLG München zu Influencern: Cathy Hummels’ schöne “neue Welt”*, LEGAL TRIBUNE ONLINE (June 25, 2020), <https://www.lto.de.recht/nachrichten/n/olg-muenchen-cathy-hummels-sieg-influencer-streit-schleichwerbung-instagram/>.

13. See generally Shafiel A. Karim, “Clear and Conspicuous” Disclosures Between Celebrity Endorsers and Advertisers on Social Media Websites, 25 COMPETITION: J. ANTI., UCL & PRIVACY SEC. ST. B. CAL. no. 2, 2016, at 172.

potential plaintiff.¹⁴ In both codes, it is impossible to estimate the chances of winning a case, and, in Germany, it is unlikely that a claim for damages will be granted.¹⁵

This article's aim is to analyze both systems, summarize the advantages of them, and present solutions in terms of improving legislation and jurisdictions, especially concerning the issue of the lack of clarity that is found in both the German and the American legal systems. This article offers answers to the pressing questions as to the form that online disclosures should take and suggests how to simplify enforcement. It also provides new definitions for online advertising, especially with regard to the form taken by disclosures within the U.S. and the German legal systems and goes into the specifics of the term "commercial action", which is always required for the latter.

Part I of this paper offers an overview of endorsements on social media within both legal systems and shows how these structures deal with advertisements in general and with issues in the social media landscape specifically, illustrated by the example of Instagram. The first part compares these systems with each other and shows where the exact issues concerning endorsements on social media are to be found. Part II proposes a solution that requires a disclosure to be clear enough for it to be recognized as an advertising measure solely by looking at its objective presentation, without having to view the content or additional text in both systems and defines the term "commercial action" in more detail in different areas of the internet. The direct effects of the proposal are depicted, along with benefits of the proposal such as efficiency, up-to-date legislation, and, in particular, the avoidance of deception, which ensures that all competitors are treated fairly. Part III discusses the potential objections to the suggestions made.

I. THE PROBLEMS WITH REQUIRING ENDORSEMENTS TO BE DISCLOSED ON SOCIAL MEDIA

There is an enormous market for advertisements on social media, with up to 19 percent of all advertisements in the U.S. featuring celebrity endorsements.¹⁶ The amount of money spent on social media advertising is

14. UWG, *supra* note 7, at §8(3).

15. See VOLKER M. JÄNICH, LAUTERKEITSRECHT [Law of Unfair Competition] 228 et seq. (1st ed. 2019) (Ger.).

16. See Karim, *supra* note 14.

also increasing exponentially, amounting to \$18,400,000 in 2019.¹⁷ This has led to great interest in this area of law, but the German and the American systems face similar difficulties in dealing with issues that arise in advertising law. After presenting the German and the U.S. systems, Part I summarizes the issues that crop up in both countries, namely, that the requirement to disclose endorsements on social media is ambiguous, that there is a lack of clarity about the legal situation (especially regarding the content, extent, and form of disclosures), and that enforcing this is a difficult task. Part I also provides explanations and expounds the issue further.

A. Disclosing Endorsements on Social Media

Before exploring the different legal systems, it is worth providing a short overview of the specific field of social media advertising and endorsements. The example of influencers on Instagram will be used to illustrate the practical process of advertising on social media networks, with the most common specialist terms being defined.

While the German legal definition of an advertisement revolves around a specific expression, the U.S. definition presupposes that a sponsor is identified and the advertisement is publicized via mass media.¹⁸ Both of these definitions include the aim of convincing another person, or potential customer.¹⁹ On the other hand, the FTC defines endorsements to include messages that consumers are likely to believe.²⁰ Additionally, they do not apply to advertisers promoting their products by referring to a celebrity because of an *argumentum e contrario*.²¹ This is legally enforceable by a binding contract between a company and a famous person, or, alternatively, a regular person who is qualified for this position by virtue of a statement and the likelihood that they will be trusted.²² Influencers, or in other words, everybody with the ability to influence another person, are automatically qualified as endorsers as long as they try to convince potential customers. Given that influencers are only to be found on social media, which can be

17. Statista Research Department, *Social Media Advertising Spending in the U.S. 2012-2019, by Type*, BIA ADVISORY SERVICES (Jan. 22, 2015), <https://www.statista.com/statistics/246339/social-media-advertising-spending-in-the-us-by-type/>.

18. See JÄNICH, *supra* note 15, at 82.

19. See also REBECCA TUSHNET & ERIC GOLDMAN, *ADVERTISING & MARKETING LAW: CASES & MATERIALS*, VOL. 1, at 12 (4th ed. 2018).

20. See, e.g., Fed. Trade. Comm'n, *Guides Concerning the Use of Endorsements and Testimonials in Advertising*, 16 CFR §255 (2009); REBECCA TUSHNET & ERIC GOLDMAN, *ADVERTISING & MARKETING LAW: CASES & MATERIALS*, VOL. II, at 589 (4th ed. 2018).

21. See TUSHNET, *supra* note 21.

22. See generally *id.*, at 591, 593 et. seq.

viewed as a form of electronic organizational communication between external parties, as well as a medium for internal communication and social interaction, also fulfills the requirement relating to mass media.²³ This is of particular interest in the area of marketing, where potential buyers can be influenced by promotion or recommendations. In turn, this creates a connection between the definitions of advertisements and endorsements.²⁴

On Instagram, anyone in the world can share their lives with others, and many people do so. However, posts also can be used to promote an advertiser's products. For users, social media offers a good opportunity to see what life is like for their friends – and for their idols. A person can share snippets of their life by uploading photos or videos, combined with short explanations and hashtags that link to other Instagram pages. The character limit is 2200 and the limit for hashtags is 30, but it is not possible to see the entire message immediately. What users most often do is scroll through different photos to gain an overview of new posts and as a consequence, unless users click a special button, they will not see more than the first 140 characters of the message.²⁵ Products and other accounts can also link hashtags by adding a button at the bottom of the image. These practical facts are important because they highlight different options for disclosures. Furthermore, the examples generally serve to illustrate abstract jurisdictions rather than the practice of advertising on social media per se.

B. *Disclosure Requirements Under U.S. and German Law*

U.S. advertising legislation encompasses several institutions with different rules and guidelines. Germany's revolves around the Act against Unfair Competition, supplemented by other laws. However, there are many abstract rules in both systems and the jurisdiction is of great importance. Before explaining the practical issues that arise in terms of endorsements on social media, it is necessary to provide an overview of the German advertising and marketing law system, where problems obviously arise,

23. See *Social Media*, MARRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/social%20media> (last visited Aug. 14, 2019); See also Paul M. Leonardi et al., *Enterprise Social Media: Definition, History, and Prospects for the Study of Social Technologies in Organizations*, 19 J. COMPUT.-MEDIATED COMM'N 1, 1-19 (2013).

24. See generally Jason Kim, *FTC Social Media Endorsement Guidelines: The Effects on Social Media Users and Business Owners*, BOS. COLL. INTELL. PROP. AND TECH. F. (2017); Eryn M. Starun, *Opening Doors: Accessibility, Social Media, and Technology Issues for the Cultural Sector*, 62 PRAC. LAW 21 (2016).

25. Christoph Trappe, *How Many Characters do you have in an Instagram Caption Before the More Button Shows?*, TUNE IN (July 11, 2016) <https://authenticstorytelling.net/how-many-characters-do-you-have-in-an-instagram-caption-before-the-more-button-shows/>.

compared to the U.S. system with its large-scale market, to gauge the jurisdiction and observe the development of the law.

1. The FTC Endorsement Guides: How U.S. Law Deals with Advertisements and Endorsement on Social Media

The U.S. system of advertising and marketing law is constitutionally protected.²⁶ The U.S. is also home to different sources and organizations attempting to answer how social media advertisers should behave.²⁷ However, none of them offer true clarity in terms of permitted and non-permitted posts. This section discusses the basic concepts and legal protection standards of U.S. advertising law, from the constitutional principles of the First Amendment to judicial bodies and powerful institutions like the FTC, to directives and regulations. Advertising is fundamentally protected by the First Amendment of the U.S. Constitution, in the form of commercial speech, which proposes a commercial transaction or makes an pronouncement related solely to economic interests.²⁸ Moreover, a four-factor balancing test with high barriers restricts this to non-misleading commercial speech about a lawful activity.²⁹ There is a structure of three systems that regulate truth in U.S. advertising: A violation of the public interest can be enforced by federal, state and local government regulators, while proprietary interests can be enforced by competitors as a matter of unfair competition or by consumers, as long as they have been deceived or harmed by advertising.³⁰ The latter are often protected by state consumer protection law, which is enforced primarily through class action lawsuits.³¹

The most important organization administering consumer protection laws is the FTC.³² Its principles include a central rule that prohibits “deceptive acts or practices in or affecting commerce,” which is supplemented by more specific rules.³³ These rules regulate the procedure for lawsuits and the enforcement of unfair trade as well, but these components are derived from the federal system.³⁴ Once one of various investigatory approaches has identified that a violation has taken place, the

26. U.S. CONST. AMEND I.

27. See Starun, *supra* note 25; See, e.g., TUSHNET, *supra* note 19, at 67 et. seq.

28. See generally TUSHNET, *supra* note 19, at 26.

29. *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980).

30. GOLDMAN, *supra* note 19, at 52.

31. *Id.*

32. See Starun, *supra* note 25.

33. 15 U.S.C § 45 (2012).

34. *Id.*; See Kim, *supra* note 25.

commission usually makes use of internal administrative trials as a first enforcement tool. Entering a final order or passing the decision to an administrative law judge, educational objectives and non-binding advisory opinions also come into play as well.³⁵

There are further institutions and statutes of significance, such as the Lanham Act,³⁶ encompassing federal issues, trademark issues and false advertising. This law offers protection against violations such as false or misleading statements of fact.³⁷ An alternative for national advertisers is voluntary arbitration by the National Advertising Division (“NAD”), which is less complex and less pricey than litigation. The NAD is overseen by the Advertising Self-Regulatory Council which is part of the Better Business Bureau.³⁸ State law, or common law respectively, comes into play when a warranty of claims is breached³⁹ or when fraud or deceit occurs. State consumer protection laws, which are often based on the Uniform Deceptive Trade Practices Act or the model Unfair Trade Practices and Consumer Protection Law are applicable in this instance.

The arising question in terms of how U.S. law deals with advertisements and endorsements on social media, will now be answered by looking at the main sources of law and the jurisdiction. The basic rule on omissions and disclosures is that all the information required to be included in an advertisement for it to be non-misleading must be disclosed.⁴⁰ The FTC’s non-binding guidelines for endorsement will also be discussed, and the situation will be illustrated with reference to influencers on Instagram. From the very beginning, it must be stated that the protection of the First Amendment does not apply to false or misleading commercial speech.⁴¹ The two basic advertising regulations under the FTC’s purview are that advertising must be truthful and not misleading and that advertisers must adequately substantiate product claims before disseminating the advertisement.⁴² Relevance to a consumer’s decision-making is an important factor for the Lanham Act but does not

35. TUSHNET, *supra* note 19, at 56-58.

36. Lanham Act, 15 U.S.C. §§ 1051-1141n.

37. *See, e.g.*, TUSHNET, *supra* note 19, at 67.

38. TUSHNET, *supra* note 19, at 68 et seq.

39. *See Sandoval v. PharmaCare US, Inc.*, 145 F. Supp. 3d 986 (S.D. Cal. 2015).

40. *See, e.g. .com Disclosures: How to Make Effective Disclosures in Digital Advertising*, FEDERAL TRADE COMMISSION 1, 5 (March 2013), <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-staff-revises-online-advertising-disclosure-guidelines/130312dotcomdisclosures.pdf>.

41. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974); *See Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, OYEZ, <https://www.oyez.org/cases/1979/79-565> (last visited Nov. 2, 2019).

42. *See Advertising Substantiation Policy Statement*, 49 Fed. Reg. 30999 (Aug. 2, 1984).

automatically amount to a misleading act when these factors are not disclosed, although there is sometimes a duty to correct popular misconceptions.⁴³ For the NAD, criteria for the assessment of whether consumers are being misled include the advertiser's uncertainty and, for the FTC, the likeliness of them being misled.⁴⁴

The key principle for disclaimers, which represent a possible solution for otherwise misleading ads, as well as for disclosures, is that they must be clear and conspicuous, accurate, and suitable for being read and understood by not just the most meticulous reader.⁴⁵ This means that advertisers have to consider the relative sophistication of their audience. The FTC judges these requirements according to whether a consumer is able to notice the disclaimer in question, whether the wording and format are easily understandable as well as non-distracting, and whether the disclaimer is appropriately positioned.⁴⁶ If it is not possible to provide all the necessary disclosing information in a specified format, it is believed that the format is not appropriate for the advertisement.⁴⁷

Since the question of what must be disclosed appears to be fairly simple, this gives rise to the more complex question of how to make this disclosure itself. The non-binding FTC Endorsement and Testimonials Guidelines play an important role in this.⁴⁸ The main point of these guidelines is to reflect the rule that endorsements must be non-misleading and honest. Furthermore, a connection between the endorser and the advertiser must be disclosed, with this connection likely unexpected and possibly having an impact on the advertiser's and the ad's credibility.⁴⁹ Furthermore, a financial benefit can turn an advertising message into a paid endorsement, and moreover, celebrities appearing in advertisements can be

43. See TUSHNET *supra* note 20, at 590.

44. See Porter & Dietsch v. FTC, 605 F.2d 294, 308-309 (7th Cir. 1979).

45. See, e.g., Jim Tobin, *Ignorance, Apathy Or Greed? Why Most Influencers Still Don't Comply With FTC Guidelines*, FORBES (April 27th, 2018), <https://www.forbes.com/sites/forbesagencycouncil/2018/04/27/ignorance-apaty-or-greed-why-most-influencers-still-do-nt-comply-with-ftc-guidelines/#2c435db67e9d>; see also Karim, *supra* note 14; See Donaldson v. Read Magazine, Inc., 333 U.S. 178, 189 (1948).

46. See Karim, *supra* note 14; TUSHNET, *supra* note 20, at 590.

47. See Caroline McCarthy, *Yes, New FTC Guidelines Extend to Facebook Fan Pages*, CNET (October 5th, 2009), <https://www.cnet.com/news/yes-new-ftc-guidelines-extend-to-facebook-fan-pages/>.

48. *Guides Concerning the Use of Endorsements and Testimonials in Advertising*, FEDERAL TRADE COMMISSION (September 18th, 2017), <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-publishes-final-guides-governing-endorsements-testimonials/091005revisedendorsementguides.pdf>.

49. *The FTC's Endorsement Guides: What People Are Asking*, FEDERAL TRADE COMMISSION, <https://www.ftc.gov/tips-advice/business-center/guidance/ftcs-endorsement-guides-what-people-are-asking> (last visited August 27th, 2020); See TUSHNET, *supra* note 20, at 590.

inferred to be endorsers, even when there are no relationships between them and the advertiser.⁵⁰ Advertisers can fulfill their obligations by telling endorsers how to disclose, which makes them liable.⁵¹

Back to the example at hand, it can be summarized that influencers should, in principle, disclose every piece of content sponsored by an advertiser in a clear and conspicuous way and, since there is a huge scope of interpretation in this regard, influencers should follow the FTC's endorsement guidelines and recommendations to ensure they are compliant with the law. Adding #sponsored or #ad at the beginning of a Facebook or Twitter post or at the top of the wording added to an Instagram post is the safest way to disclose the endorsement.⁵² A disclosure in the content hidden by the "more" button will probably not be acceptable because most users just scroll through the various new posts to gain an overview of what has been happening.⁵³ Similarly, using #ambassador will probably not be enough because of the standard use of this word in a different context, but #[BRAND]ambassador might be appropriate. The array of guidelines and lack of clear rules, paired with near-endless ways of making a disclosure, mean that nearly every disclosure is a matter of interpretation, leaving influencers perplexed.⁵⁴

2. How German Law Deals with Advertisements and Endorsements on Social Media

The German system of advertising law is more compact than the U.S. system. The most important German sources of law are the UWG and the Telemediengesetz, as well as the Rundfunkstaatsvertrag. Although this is not common in civil law, cases are very important for interpreting the abstract rules.⁵⁵ Even though the basics of the German system are simpler, this does not indicate it is better. On the contrary, it is more abstract and complicated, despite it being civil law. One factor is that EU law has a huge impact on German legislation and jurisdiction. EU directives have taken on great practical relevance for the application of national law due to

50. See eSalon, NAD Case No. 5645 (October 17th, 2013).

51. See Kim, *supra* note 25.

52. See *FTC Endorsement Guidelines (Infographic)*, MEDIKIX (Nov. 14, 2019), <https://mediakix.com/blog/ftc-endorsement-guidelines-sponsored-infographic/>; See also Leeb; Maisch *supra* note 7.

53. See *id.*; see generally Karim, *supra* note 14.

54. See generally *Influencer Dos and Don'ts*, PFEIFFER LAW (Apr. 30, 2020), https://assets.websitefiles.com/5d162672099ac326fdb7208d/5eaca3df5c6b73418b12d1d2_Influencer_Dos_and_Donts_for_Hashtags_2020-04-30.pdf.

55. UWG, *supra* note 7.

the directive-compliant interpretation of EU law.⁵⁶ The legislature has to enact laws that align with the EU and the jurisdiction, and even has to interpret German laws in compliance with EU directives. Europe has made many attempts to align with the modern age, and there are great differences with current German law, which is why there have been many changes to German legislation concerning advertisements in the last years.⁵⁷

This fast-changing advertising landscape is the reason why the law has to be abstract: it makes it easier for the court to find solutions that work for special cases and allows judgements to compare and refer to precedents set by case law making judgements particularly important in this area of law. The German constitution Grundgesetz represents a level between EU law and federal law, which can be of importance if there is a violation of articles twelve and fourteen, professional freedom and the freedom of property and competition, as well as for crafting arguments regarding the interpretation of federal laws.⁵⁸

The most important source of law relating to advertising is the German Act against Unfair Competition, or UWG. There are different bases for a claim, of which elimination and omission are the most common.⁵⁹ Damages are almost never enforced because the complaint must offer evidence that the defendant acted negligently or with intent.⁶⁰ Furthermore, the plaintiff must prove the high burden that damage occurred – this is near-impossible because the plaintiff would have to show how exactly his property is impaired.⁶¹ Another limitation is that only parties who are competitors or various legally approved organizations may file suit.⁶² The fundamental requirement for an unfair competition case is a commercial action, which is legally defined.⁶³ Another key requirement is the inadmissibility of the commercial action. As a result, the UWG provides a range of abstract opportunities as well as specific facts, such as the inadmissibility of unfair acts or a violation of a rule in the catalogue of cases appended to the UWG, which applies only in the business-to-customer (B2C) sector.⁶⁴ The exact definition of unfair acts, in this context, is provided by the subsequent paragraphs, which protect competitors and

56. JÄNICH, *supra* note 15, at 29.

57. *Id.*

58. JÄNICH, *supra* note 15, at 35-37.

59. UWG, *supra* note 7, at §8.

60. UWG, *supra* note 7, at §9.

61. JÄNICH, *supra* note 15, at 250-253.

62. UWG, *supra* note 7, at §8-11.

63. UWG, *supra* note 7, at §2(1)1.

64. UWG, *supra* note 7, at §3.

consumers alike from aggressive, misleading, or unfair comparisons or unreasonable harassment, among other actions.

Other sources of the law regarding advertisements include the German Telemediengesetz (TMG), or in English, the federal Telemedia Act, and the Rundfunkstaatsvertrag (RStV), a contract between all 16 German states.⁶⁵ First and foremost, the TMG applies to electronic information and communication services, and therefore to the internet, as well.⁶⁶ According to the TMG, the provisions of the Act against Unfair Competition remain unaffected by the TMG. The consequence of a violation of the TMG is either a duty to pay an administrative fine or enforceability under the Act against Unfair Competition,⁶⁷ because a legal requirement such as those in the TMG can also be unfair and thus inadmissible within the meaning of the UWG.⁶⁸

In addition to the numerous possible ways for the content of an advertising message to make claims and for the advertisement itself to be an unreasonable harassment⁶⁹ that misleads through omission, supplementary Section 5a(4) UWG⁷⁰ also serves as a basis for a claim. This states that not disclosing the commercial purpose of a commercial action, unless it is clear from the circumstances themselves, represents an unfair act. This clause, and number eleven of the annex to the UWG, is of significance for influencers because endorsers now have a duty to disclose their connection to the advertiser. As a result, the basic rule is the same as in U.S. law. In addition to the requirement for a commercial purpose and the non-disclosure to exist, there is one more component of this offense that is relevant to the consumer's decision.⁷¹ This is present most of the time because the average consumer is more critical when they are dealing with an advertisement compared to a recommendation.⁷²

The fact that the definition of an endorser meets the requirements relating to a commercial purpose is of great import for the Instagram example. This is where the Cathy Hummels case is particularly fascinating: Cathy Hummels did not receive any money for her recommendations. The

65. See Jonas Kahl, *Grauzone mit Abmahnrisiken* [Gray Zone with Warning Risks], LEGAL TRIBUNE ONLINE (Aug. 10th, 2015), <https://www.lto.de/recht/hintergruende/h/youtube-schleichwerbung-product-placement-werbung-irrefuehrung/>.

66. Telemediengesetz (TMG) [Telemedia Act], Feb. 26, 2007, BGBl I at 179, as amended, § 1 (Ger.).

67. *Id.* at § 6(3).

68. UWG, *supra* note 7, at §3(1).

69. UWG, *supra* note 7, at §4a.

70. UWG, *supra* note 7, at §5a(4).

71. UWG, *supra* note 7, at §5.

72. JÄNICH, *supra* note 15, at 187

German court decided that, in her function as an influencer, she was always trying to make a profit from her pictures and words, even if this took the form of trying to acquire new contracts. As a result, Cathy Hummels' Instagram posts represent commercial transactions.⁷³ This means that Cathy Hummels is to be treated as an endorser, even without a contract between her and the non-linked company. Despite that treatment, Hummels won her case because the court concluded consumers would have recognized the message as an endorsement, since she is an influencer. Thus, if an influencer were to advertise a product, they would not be in violation of § 5a UWG—even without an endorsement disclosure—because the assumption is that consumers know about the advertisement. The TMG (which governs disclosures made on the internet) requires endorsers to make endorsement disclosures;⁷⁴ (1) it provides that commercial communications must be clearly recognizable as such; and (2) that, on whose behalf the commercial communication was made must be readily available.⁷⁵ Probable consumer recognition of the message as an advertisement is not a requirement. Furthermore, the RStV⁷⁶ states that the advertisement must be clear and conspicuous.

3. Summary of the Problems with the Current Approach to Endorsements, Based on the Comparison of Both Systems

An analytical comparison of the German and the U.S. systems, based on the Cathy Hummels case, demonstrates that both systems' advertisement-disclosure requirement—which is intended to avoid misleading people—is vague, unclear, and difficult to enforce. Moreover, the German system suffers from ambiguity relating to the term “commercial action” as well as the exemption as to when disclosure is not required.⁷⁷ The impact of an unclear definition of “commercial action” is big because the term is a steady requirement for nearly every basis for a claim within the UWG.⁷⁸ Before highlighting the weaknesses of both

73. See Landesgericht München I [LG] [Regional Court] April 29th, 2019, Gewerblicher Rechtsschutz und Urheberrecht Rechtsprechungs-Report [GRUR-RR], available at <https://rsw.beck.de/aktuell/meldung/lg-muenchen-i-weist-klage-gegeninfluencerin-cathy-hummels-um-produktpostings-auf-instagram-ab>.

74. Telemediengesetz (TMG) [Telemedia Act], Feb. 26, 2007, BGBl I at 179, as amended, § 5 (Ger.).

75. *Id.* at § 6.

76. Rundfunkstaatsvertrag [RStV] [State Broadcasting Contract], Aug. 31, 1991, Gesetz-und Verordnungsblatt für das Land Brandenburg [GVBl I] at 1991 581, as amended, § 58(1) (Brandenburg) (Ger.).

77. See generally JÄNICH, *supra* note 15, at 187.

78. *Id.*

systems' approach to the online advertising issue, it is necessary to summarize the basic concepts on these issues. First, in the U.S. system, the Lanham Act—which is the primary source of federal law on point—prohibits “[f]alse or misleading descriptions of fact . . . “ that could mislead people.⁷⁹ In order not to be misleading, an advertisement has to be disclosed and this disclosure has to be clear and conspicuous.⁸⁰ Second, in the German system, the main requirements for filing a claim are a “commercial action” and that “commercial action’s” inadmissibility.⁸¹ This is the case when that action is unfair (like when the commercial purpose is not indicated), and the disclosure also has to be clear and conspicuous enough for the consumer to recognize it.⁸² However, an exception to the disclosure requirement, is when the circumstances themselves make clear that there is an advertisement at play.⁸³ Hence, the core concept is the same in both systems.

The Cathy Hummels case illustrates some conceptual lack of clarity inherent in both systems, as well as the German system’s exemption for, and definition of, “commercial action.” While in the U.S., the definitions of endorsements and advertisements require either a payment or promise of compensation to be made; in Germany, the Hummels court broadened the scope of that definition by considering influencers to be constantly undertaking commercial actions, because they are always acting in consideration of their profession.⁸⁴ Consequently, the court held that the exception applies because social media users would know that Hummels is an influencer, and thus, always know to expect advertisements.⁸⁵ The implications of this approach demonstrate that this reasoning is flawed: if this train of thought were continued, that would mean that viewers have no way to distinguish posts revolving around sharing an individual’s life, from posts published for the reason of gaining a direct financial benefit.⁸⁶ This matters because consumers are more critical of paid statements than of non-

79. 15 U.S.C § 1125.

80. See *FTC Endorsement Guidelines (Infographic)*, MEDIKIX (Nov. 14, 2019), <https://mediakix.com/blog/ftc-endorsement-guidelines-sponsored-infographic/>; see generally TUSHNET *supra* note 19.

81. UWG, *supra* note 7, at § 8.

82. JÄNICH, *supra* note 15, at 187.

83. UWG, *supra* note 7, at § 5(a)6.

84. See TUSHNET *supra* note 19; See, e.g., Lill, *supra* note 5.

85. Landesgericht München I [LG] [Regional Court] April 29th, 2019, Gewerblicher Rechtsschutz und Urheberrecht Rechtsprechungs-Report [GRUR-RR] <https://rsw.beck.de/aktuell/meldung/lg-muenchen-i-weist-klage-gegeninfluencerin-cathy-hummels-um-produktpostings-auf-instagram-ab>.

86. See Solmecke, *supra* note 8.

paid statements.⁸⁷ Furthermore, the case reveals both systems' general problem of inadequately defining what constitutes clear disclosure, because the vague "clear and conspicuous" requirement does not set distinct parameters. This in turn entices influencers to hide their endorsements within the framework of the rules, for aesthetics reasons. The language of both systems' statutes fail to answer the question as to whether a specific attempt to disclose is clear enough, and even caselaw, which people in U.S. and Germany both depend on for statutory interpretation, does not resolve these questions. Further, not enough cases have been decided to cover every possible situation where people try to make a disclosure.⁸⁸

There are also enforcement issues in Germany and the U.S. due to the complicated systems. Enforcement in the U.S. is complicated because there are several different institutions that create and enforce statutes and guidelines, such as the FTA and the NAD, so it can be difficult to determine who has jurisdiction and which laws apply. ⁸⁹ German law, however, is more transparent since it is enforceable by German courts and the Act against Unfair Competition is at the heart of advertising issues. That said, other problems do arise. First, unfair competition is not IP law, and when IP issues occur (such as in the area of trademarks or, as in the example here, in the media context) the text of the law does not align perfectly with the situation at hand. Second, EU directives regarding advertisements do not accord with this law and lead to conflicting language and difficulty with interpretation.⁹⁰ Third, it is rare that damages are awarded, and only competitors or particular organizations are allowed to sue. Although the U.S. system is less transparent than the German system, America's approach of suing advertisers for endorsers' violations and less burdensome requirements for receiving damages, is better.⁹¹ One negative consequence of the difficulties with enforcement is that strong parties are strengthened further because advertisers do not have to fear overly weighty consequences. Additionally, influencers who are already well-known have the power to try and push the boundaries because they do not have to fear direct consequences.⁹²

87. See JÄNICH, *supra* note 15, at 187.

88. See generally WILLIAM BURNHAM, INTRODUCTION TO THE LAW AND LEGAL SYSTEM OF THE UNITED STATES (6th ed. 2016).

89. See Carolyn Elefant, *The "Power" of Social Media: Legal Issues & Best Practices for Utilities Engaging Social Media*, 32 ENERGY L.J. 1, 11 (2011).

90. JÄNICH, *supra* note 15, at 29.

91. See generally Kim, *supra* note 25.

92. See also Karim, *supra* note 14, at 189.

II. PROPOSING A STATUTORY SOLUTION FOR INFLUENCERS' DISCLOSURE REQUIREMENTS

While amendments to German and American legislation represent a statutory solution to the issue of the lack of clarity, this section also proffers suggestions to assist with the enforcement issues that arise (to a surprisingly limited extent) in both systems. First, a proposal for a statutory solution to clarify the rules relating to advertising on social media will be provided, along with a demonstration of how enforcement can be simplified. Then the advantages adopting the proposal will have on jurisprudence, transparency and equality, and efficiency, will be explored. For online advertising cases, Part II proposes that the U.S. and Germany adopt a definition for the legal situation in terms of the question of how exactly to make a disclosure, which has, so far, been ambiguous. Moreover, it suggests Germany to precisely define the term “commercial action.”

A. Draft Amendment for the U.S. and Germany

Drawing on the analysis above that highlighted the negative aspects of German and U.S. law, the aforementioned ambiguity precludes a need to better define what constitutes lawful disclosure. Specifically, what do influencers have to do to have disclosure that complies with the American “clear and conspicuous” requirement, and the German “commercial action” indication requirement, or the exception of not having to disclose if it is clear from the circumstances. The proposal sees these requirements as being satisfied if the disclosure regarding the commercial action can be recognized as an advertising measure solely by looking at its objective presentation, without having to view its content or additional text. Furthermore, to achieve a just result in the German system, the important term “commercial action” has to be redefined to encompass social media and the internet. The proposal does so by considering a “commercial action” as only being relevant for cases of recommendations by a person when there is an interest in gaining a direct commercial benefit from the act.

The new definition for the American system relating to the form a disclosure should take reads as follows:

In the case of online advertising, the disclosure is clear and conspicuous if it can be recognized as advertising measure solely by looking at its presentation without having to view its content or additional text.

This could be embedded within existing legislation in several ways. First, courts could incorporate it into the caselaw by applying the rule to upcoming cases. Second, the FTC could adjoin the rule to their pre-existing requirement for advertisements to be clear and conspicuous. Third, the requirement for disclosures to be clear and conspicuous could be appended to the U.S.C., or the Lanham Act, and defined by the text proposed.⁹³

The proposed amendment for Germany should be added to § 5a VI UWG.⁹⁴ The existing text would be subsection one of § 5a VI UWG,⁹⁵ with the amended text being subsection two:

(6) Unfairness shall also have occurred, [. . .]. [i]n areas of the Internet,

1. for cases of recommendations by a person, a commercial action only applies when there is an interest in gaining a direct commercial benefit from the act;

2. *the commercial purpose is indicated if it can be recognized as being an advertising measure solely by looking at its presentation without having to view its content or additional text;*

3. the commercial purpose is not evident from the circumstances.

1. Analysis of the Proposal

An analysis of the proposed amendments shows that providing a more in-depth definition of the form of the disclosure required in both systems, laying down objective features for recognizing it, and specifying the term “commercial action” in the German system, serve to make the law more applicable to the cases at hand. It also reveals the potentially restrictive consequences for social media networks, advertisers, endorsers, and consumers. It is important to draft the amendments so that they cover every instance of online advertisements, which, in turn, enables the amendments to apply to as many relevant cases as possible.⁹⁶ The U.S. proposal can be implemented in different ways, but the existing “clear and conspicuous” requirement must be defined in more detail.

The proposal for Germany is fundamentally undertaking the same task by defining when the “commercial purpose” (the equivalent to the U.S. disclosure requirements) is indicated, but more criteria are needed for justice to be achieved. One necessary criterion is the term “commercial

93. See generally BURNHAM, *supra* note 86.

94. UWG, *supra* note 7, at §5a(6).

95. *Id.* (emphasis added).

96. See generally Andrew Hall, *Online Casino Advertising: Testing the Limits of Commercial Speech*, 6 U. PITT. J. TECH. L. & POL’Y 2 (2006).

action,” which now requires there to be an interest in gaining a direct commercial benefit from the act. This is to avoid including the instance where every act by influencers is considered to be a commercial action and where there is no opportunity to distinguish between posts in which they are simply sharing their lives and posts in which they are disseminating sponsored content. The other criterion is the need to remove the exception for online cases, which would result in (1) requiring all advertisements to be disclosed, and (2) eliminating the presumption that social media users are aware an influencer’s post is an advertisement by virtue of being an influencer. Now that a more detailed definition has been provided as to how online advertisements need be disclosed, it would be contradictory to exempt any cases from the overarching proposal and thus reopen the scope for interpretation of when disclosure is not necessary.

The proposal’s key requirement applies to both systems and has many direct, and partly restrictive, consequences for social media networks, advertisers, endorsers, and consumers. Social media networks need to provide a special tool that enables users to mark posts featuring advertising, in a way that differentiates them from non-advertising posts. In fact, many of the networks already provide suitable options, such as frames, special buttons showing the existence of a partnership and a link to the partner, or Instagram’s headings above the posts stating, “paid partnership”.⁹⁷ That said, the biggest restrictions will be borne by the influencers. They would be obliged to use the opportunities for disclosure on offer to them and show their commercial intent in a highly conspicuous manner. In other words, they now have to use the tools provided by the social media platforms in question. Nearly everything will stay the same for advertisers; they will only have to ensure that their endorsers comply with the new rules. The issue that claims are directed against advertisers, and not against the influencers involved in the violation, is not addressed in the proposal because advertisers have the opportunity to assert a follow-up claim by providing a specific clause in their contracts.⁹⁸ Lastly, the proposal not only gives consumers the chance to know if the content they see is an advertisement and thus, the opportunity to limit the trust they place in the influencer’s recommendation; it also gives them the opportunity to decide, in advance, whether they want to see sponsored content that is only shared because of commercial interests in doing so, or if they want to skip the

97. See *Branded Content auf Instagram*, INSTAGRAM (last visited August 14th, 2020), <https://help.instagram.com/116947042301556>.

98. See TUSHNET, *supra* note 20, at 593.

advertisements and only look at influencers' posts that revolve around sharing their lives.

The example of a soccer influencer promoting soccer shoes illustrates the main changes. All the issues and ambiguities associated with the Cathy Hummels case can be resolved with the amendments made on the German side because, in both systems, a direct commercial benefit is now required for disclosure to be necessary. Instagram provides a few options for marking advertisements as such, including captioning a post with the term "sponsored content" or linking the sponsoring advertiser visually by means of a button located in the corner of the post.⁹⁹ Those options comply with the new proposal because they are both easy to spot, enabling everyone to recognize the connection to a sponsoring partner by looking at the post's visual appearance and not at its content. While the proposal requires other social media platforms to provide similar options, such as red frames for sponsored posts, the soccer influencer is obliged to use these options. In the German proposal, it is necessary to define a "commercial action" as being relevant for cases of recommendations when there is an interest in gaining a direct commercial benefit from the act. This is to prevent every online action by an influencer from being considered a commercial action.¹⁰⁰ The effect of the proposal on this point is that it enables social media users to distinguish an influencer's personal posts from sponsored content; otherwise every action by an influencer is subject to the disclosure rules.¹⁰¹ For instance, the proposal does not oblige Cathy Hummels to comply with the disclosure rules when she is not gaining a direct commercial benefit, like when she posts a photo of a cuddly elephant without receiving money for it. Furthermore, since the overarching proposal for both systems encompasses all of the desired requirements, it is consequently necessary to remove the exception from the German system because no cases should be excluded from the proposed online disclosure obligations.

2. Effects on Enforcement and Further Suggestions

While the issue of complicated enforcement will become less of a concern in the U.S. due to the clarity created by the proposed amendment, a more major change would be necessary in the German system to simplify and improve enforcement, such as changing its structure or adding options for making a claim. The main problems in the U.S., as far as enforcement goes, are that different rules are distributed across different laws (and in

99. See *Branded Content*, *supra* note 94.

100. See, e.g., *Solmecke*, *supra* note 8.

101. See generally *Karim*, *supra* note 14.

some cases, mere guidelines), as well as different organizations. In turn, this leads to confusion, and makes it impossible to predict the outcome of cases. Providing clear rules resolves most of these issues because it makes it far easier to differentiate between what is allowed and what is not.¹⁰²

Since defining the rules is, unfortunately, not enough to simplify enforcement in the German system, only major changes, such as providing an article allowing class actions, creating a difference damages-calculation approach, or developing a new system that alters who has standing, would offer a solution. An easy-to-implement suggestion is to include a new article allowing class actions in the UWG, based on the U.S. model.¹⁰³ This would allow affected consumers the opportunity to file a claim on the basis that their rights have been violated. Furthermore, this would even make it easier for them to enforce damages.¹⁰⁴ Another suggestion would involve using a different formula for calculating damages and including estimated damages, too, because damages are almost never awarded due to the evidence requirement.¹⁰⁵ The final suggestion would be to give everyone affected by an unfair act the opportunity to file a lawsuit.¹⁰⁶ Practical limitations make the suggestion of establishing class actions the most reasonable approach.

B. Advantages of Adopting the Proposal

The proposal offers various benefits and positive effects on equality and justice, jurisprudence, and efficiency by creating clarity and requiring social media users to have the opportunity to distinguish between sponsored content and posts sharing the poster's life. In turn, this would protect the competitors of advertisers who act unfairly. The clarity would enable social media platforms, advertisers, and social media users to be treated equally. As there is still sufficient freedom, the restrictions are not too onerous and the positive effects for consumers are highly significant, it is worth putting up with the limitations. Updating the law and harmonizing it with other pieces of legislation are very important points that the suggested amendment covers, and furthermore, it does so efficiently.

102. See generally TUSHNET *supra* note 19, at 52.

103. See generally JÄNICH, *supra* note 15, at 187.

104. See also TUSHNET *supra* note 19, at 319.

105. See generally JÄNICH, *supra* note 15, at 251.

106. See generally TUSHNET *supra* note 19, at 244.

1. Impact on Social Media Platforms, Endorsers, Advertisers, and Social Media Users

The first reason to adopt the proposed amendment is because it clarifies disclosure requirements. This would enable social media platforms, endorsers, advertisers, and even social media users to be treated equally. Since it is not exactly clear when and in what manner disclosure is required, and not every social media platform provides adequate opportunities to make this disclosure in a proper way, the extent to which disclosures are visible for the same number of sponsored posts differs greatly among influencers. This leads to social media users being misled by influencers trying to hide disclosures because profiles with a large number of obvious disclosures are, frankly, not appealing. The proposed amendment would require every network to provide similar opportunities for making disclosures, influencers would need to use similar or identical tools that are easily recognizable, and social media users would be able to clearly identify advertisements and compare influencers.¹⁰⁷ This equal treatment would mean that no single influencer would have an advantage over another, and as a result, there would be no unfair disadvantage between competitors.

Many of the proposed requirements would have restrictive effects, particularly on influencers, but these effects are worth putting up with, in light of the competitor and consumer protection they provide by giving the opportunity for the consumer to decide if they want to see sponsored content at all. First, social media networks should not have any problems supporting the amendment because their aim is to make money by selling advertisements and giving posters the opportunity to share their lives; they do not have a vested interest in creating a market in which influencers can advertise. However, influencers, in particular, are restricted in their freedom to choose what their posts should look like. A profile with a large number of posts that are recognizable at first glance as advertisements is not appealing to social media users. These users look at social media to see their idols' lives and not to see what they are posting because they receive money for doing so. In turn, this means that advertisers might not be interested in influencers who already have endorsement contracts to the same extent as they are now.¹⁰⁸ Influencers may not be able to post the amount of sponsored content as they did before because they have to remain appealing to their followers.

107. *See generally* TUSHNET *supra* note 20, at 593.

108. *See generally* Karim, *supra* note 14.

The restrictions are nonetheless worth tolerating because, in the end, consumers will not be misled due to the newly created comparability. As a result, the proposal ensures that advertisers' competitors are not put at a disadvantage by a lack of clear and conspicuous disclosure. The aim of all the existing rules and amendments is to prevent consumers from being misled and, if it is not ensured that the consumer knows about the advertisement, it is likely that they will be misled.¹⁰⁹ When consumers have the opportunity to decide in advance whether they want to see advertising content at all, they are less likely to be misled and even have the opportunity to decide whether they want to see sponsored content or not. Recognizing an advertisement as such after seeing its content, of course, places limits on the reliability of the influencer's expression but consumers still receive the advertising message, which nevertheless influences them and is likely to mislead them.¹¹⁰ On balance, the importance of protecting advertisers' competitors outweighs the rather minor restrictions placed on influencers and social media platforms.¹¹¹

Furthermore, it is important to state that all of the parties involved still have a good deal of freedom and choice. Social media networks are still able to determine how to fulfill the amendment's requirements and how to design these objective criteria, but it now is the job of endorsers to balance their sponsored content with their usual posts and to ensure that their followers are interested in their advertisements, as well. This can be achieved if influencers only accept endorsement contracts for products and services that they are already truly convinced by, and already have as a part of their lives. Posts showing these services and products would then go back to the true purpose of endorsement and would be more honest and interesting for social media users. Finally, of course, social media users now have unlimited freedom because they have the opportunity to decide if they want to see advertisements and are thus not misled by hidden disclosures. This means that competitors are not faced with the disadvantages of consumers buying the competing advertisers' products instead. In turn, there is no unfair competition.¹¹²

109. See, e.g., JÄNICH, *supra* note 15, at 187.

110. See generally JÄNICH, *supra* note 15, at 188.

111. See generally Leeb; Maisch *supra* note 7; See generally Karim, *supra* note 14.

112. See generally TUSHNET *supra* note 20, at 590.

2. Compliance with Legal Requirements in Today's Social Media Landscape

The second reason to adopt the proposal is that it offers the opportunity to bring the law into compliance with right and fair behavior and harmonizes both legal systems; the law currently fails to align with the modern age of social media advertising in both systems. Neither German legislation nor its American counterpart were prepared for the landscape of social media advertising and, as a result, the courts were bound to the wording of inappropriate legislation and forced to establish caselaw that fitted the law and aligned with right and fair behavior. This resulted in abstract rules that lack legal character and require further explanation before they can be applied to a variety of cases in this area of law, which can only be resolved by updating the law itself.¹¹³ Therefore, it is important to take the behavior that we know already exists and condense it down to create rules that have the effect that was intended by the original sense of the law, but that does not align with the situation. The amendment updates the law by clarifying the form that disclosure needs to take and by defining the German term of “commercial action” as being suitable for online advertising. The effect is that the proposal would enable social media users to avoid seeing sponsored content at all. This effect, as shown above, is that consumers are not misled and even have the choice of whether they want to see advertisements in the first place. This accords with the intention of the law because it also protects against other kinds of unwanted advertisements.¹¹⁴

The next positive effect regarding jurisprudence is the harmonization of German and American law, which is important given today's social media landscape. This is significant because social media operates online, and by extension, internationally. As a consequence, people from anywhere in the world can follow users from all four corners of the globe, and thus also see the products and services that they are advertising.¹¹⁵ The proposal offers a way to harmonize the effects for all the parties involved, without changing the entire systematics of legislation in Germany and the U.S. In other words, if the amendment were in play, a German user following an American influencer on Instagram, an American platform, can expect similar, or even the same, objective and distinctive features for

113. *See generally* HANS BROX & WOLF-DIETRICH WALKER, ALLGEMEINER TEIL DES BGB [GENERAL PART OF THE GERMAN CIVIL CODE] (40th ed. 2016) (Ger.).

114. *See* UWG, *supra* note 7, at §7; *See also* 47 USC § 227(a)(5).

115. *See generally* Elefant, *supra* note 87.

differentiating sponsored content from posts sharing a person's life as they would expect from a German influencer on a German network.

3. Efficiency

The third reason to adopt the proposal is that it also improves existing legislation in terms of administrative efficiency, as well as efficiency for the parties involved, by clarifying the legal situation. When the legal situation is unclear, filing a lawsuit is a major risk because none of the parties can predict how the court will decide, which could lead to huge expenses mounting up for the parties in question. It can be assumed that it would be easier to predict the outcome of judgements once the legal situation has been clarified. In turn, the majority of lawsuits that are filed are likely to be won.¹¹⁶ Furthermore, this encourages people to file lawsuits that would not have been filed because of the risk, and justice is more likely to prevail. The amendment also helps in terms of time efficiency because courts do not have to compare the case at hand with numerous former cases, look at different guidelines, and conduct surveys; in most cases, they know what decision has to be made.

Furthermore, there is also efficiency for advertisers, social media networks, endorsers, and social media users because this clarity gives rise to a raft of opportunities. First, the proposal makes it easier for advertisers to undertake contracts with endorsers and prove when they did not behave in the agreed manner. Without the amendment, it is not exactly clear what is allowed and what is not. As a result, it is difficult to prove that endorsers have engaged in violations and although they engaged in the violation, the advertiser is liable. Second, other positive effects are that influencers do not have to put a lot of effort in finding out what they are allowed to do and how they can compete with their competitors, and that social media users can save time; they no longer need to spend time looking at advertisements, or conversely, might even be able to recognize their favorite sponsored content a good deal faster.¹¹⁷

III. POTENTIAL OBJECTIONS TO THE SUGGESTIONS MADE

The proposal is necessarily very abstract, and as a result, critics may raise the objection that it cannot create the clarity required to explain the new standard with precision and set out influencers' ideal behavior because there is still room for interpretation. Furthermore, since the internet, and

116. *See generally* Karim, *supra* note 14.

117. *See generally id.*

social media in particular, works globally and connects people from all over the planet, merely implementing the proposal in Germany and the U.S. is simply a drop in the ocean. Given the impact of the EU on Germany, it is even debatable whether it would be possible to implement it at all. However, the proposal must be viewed as representing an initial step toward the fairest judgements possible.

A. Need for Interpretation and Lack of Clarity

The first objection to consider is that the proposal is still fairly abstract and requires a good deal of interpretation. Once again, this leads to a lack of clarity, confusing influencers and social media platforms alike and necessitating additional guidelines or caselaw to become established. Even with the proposal in place, influencers do not know exactly where the threshold lies, and once again, it does not answer the questions as to whether an actual caption or measure undertaken by the social media platform is enough to meet the expectations of the proposal. The courts have to establish new caselaw that answers these questions, influencers still have a broad scope of interpretation within which they can push the boundaries and, as a result, the old injustices may return because some influencers might disclose more than others.¹¹⁸ Moreover, the proposal does not state that social media networks have to provide a tool themselves. As a result, disclosures in captions created by influencers or capital letters within the post itself could meet the requirements, while simultaneously enabling influencers to be creative, and could create unexpected loopholes as a consequence.

In response to this objection, I contend that the proposal has to be this abstract to cover the variety of possible cases that it is intended to improve. Furthermore, it raises the standard, with the effect that the main goal of not misleading consumers is reached by ensuring that sponsored content is recognized as such.¹¹⁹ A direct disclosure requirement would limit influencers' freedom too much, and all the possible cases have to be covered. In addition, the online landscape is changing at an unavoidably rapid pace, and the vagueness of the proposal is designed to leave room for this. As a result, it is important to limit the scope as far as possible and to raise the threshold to a level where injustice can be avoided. In other words, the proposal's scope might still be fairly large, but it has now been shifted upwards.¹²⁰ Most importantly, the proposal makes it impossible for

118. See generally BURNHAM, *supra* note 86.

119. See generally BROX, *supra* note 109.

120. See also Karim, *supra* note 14.

a consumer not to recognize sponsored content. Indeed, it makes disclosures perfectly and objectively recognizable by prohibiting influencers from making disclosures in a way that expects the spectator to look at the post or additional text, rendering it unfeasible to hide disclosures.

B. Disadvantages Caused by Only Implementing the Proposal in Germany and the U.S.

Further objections could be raised regarding the issues caused by only taking Germany and the U.S. into consideration, namely, that the impact of the proposal is reduced and that disadvantages arise for the nations implementing the proposal. Criticism can be levelled against only changing the approach taken in the U.S. and Germany with reference to the fact that the internet and social media, in particular, function globally. As a consequence, people are connected to individuals from all around the world, and thus, influencers from any other nations will not have to follow the proposed requirements. In turn, this sets these countries at a disadvantage compared to other nations.¹²¹ Sponsored posts made by American and German influencers would be disclosed in a very obvious fashion, but the posts next to them could legally include hidden disclosures or even fail to make a disclosure at all. Viewers would automatically not be attracted to German and American influencers or advertisers to the same extent as they would other profiles or products. Additionally, since the EU has a major influence on German law, it is debatable as to how easy it would be to implement the proposal. One complication in this regard is that the EU could issue a directive requiring Germany to fully amend the law again, and thus change the entire proposal.¹²² Another issue is that as long as the EU does not require the same standard as in the proposal, other European countries will follow the EU's lead and have advantages over Germany as a result.

These objections are mitigated by the need for role models and the requirement for just behavior to prevail. Since current international law is not applicable, or rather, does not provide solutions to these issues and does not seem to be undergoing any changes in this respect, countries themselves are in charge of changing the law.¹²³ It is important to have role

121. See generally Andrew Hall, *Online Casino Advertising: Testing the Limits of Commercial Speech*, 6 PITT. J. TECH. L. & POL'Y 1 (2006).

122. See, e.g., JÄNICH, *supra* note 15, at 29.

123. See generally GRAEME B. DINWOODIE & MARK D. JANIS, *TRADEMARKS AND UNFAIR COMPETITION* (5th ed. 2018).

models who take the lead on legislative projects, even ones that are restrictive. As a result, the U.S. is the best candidate for this because it can be assumed that the large U.S. market and little competition from international products will ensure that the negative consequences would not be too painful.¹²⁴ Furthermore, the proposal paves the way for just decisions and, if history is anything to go by, it would be very likely that other countries would follow suit.¹²⁵ It is possible that the EU or surrounding countries would also require more obvious disclosures if Germany were to implement the proposal.¹²⁶

CONCLUSION

The main goal of online advertising law is to avoid consumers being misled, thereby preventing competitors of the company behind the advertisement from being put at a disadvantage as a result of consumers being more likely to buy the product advertised. The Cathy Hummels case revealed an array of weaknesses in the U.S. and German systems that have been compared to one another. They suffer from the same issue, namely, that disclosures are required to prevent advertisers from misleading consumers, but the form that these disclosures are required to take is not sufficiently clear. Furthermore, the answer to the question as to what, exactly, is a commercial action and thus when a disclosure has to be made under the German system leads to the unsatisfactory result that every action undertaken by influencers is seen through the same lens. By extension, they either all require a disclosure to be made, or do not require one, provided that everybody knows about the business at hand. In both systems, requiring online advertisements to be recognizable as advertising measures solely by looking at their objective presentation, without having to view their content or additional text, would clarify the form required for disclosures and prevent viewers from being misled, all while avoiding overly severe restrictions, updating the law, and boosting efficiency. Moreover, creating a distinction between the actions of an influencer who is gaining a direct commercial benefit from those of an influencer simply making a recommendation broadens the scope for the desired results in Germany. These represent important first steps towards achieving just outcomes in the online landscape.

124. *See generally* TUSHNET, *supra* note 320, at 590.

125. *But see* JÄNICH, *supra* note 15, at 11.

126. *See generally* WOLFGANG ISMAYR, GESETZGEBUNG IN WESTEUROPA – EU-STAAATEN UND EUROPÄISCHE UNION [Legislation in Western Europe – EU Member States and the European Union] (2008) (Ger.).