

NOTE

This is an unofficial translation of extracts from the 'Kissie' case heard by the Swedish Market and Patent Court in December 2019 re blogs/ posts by Alexandra Nilsson.

<https://www.domstol.se/globalassets/filer/domstol/patentochmarknadsoverdomstolen/avgoranden/2019/pmt-2054-18.pdf>

Blog post 1 (the text below is from pages 41 and 42 of the document linked above)

The closing text "The post is in collaboration with" could be said to constitute a special advertising tag. However, according to the Patent and Market Court, the identification has several shortcomings, which make it inadequate as advertising identification.

The first flaw is that it does not specify whom the collaboration is with. Furthermore, the text has been placed at the bottom of the post and with a small font size. In addition, the wording "in collaboration with" is unclear regarding payment or any other remuneration, since collaboration between two parties does not have to mean that there has been any payment. In the market survey conducted by Influencers of Sweden in the Spring of 2017 and cited in the case, it is evident that the majority of the respondents on a particular issue considered that the identification "In collaboration with" was a clear or very clear advertising identifier. But such a study has only a limited value. This is because in the survey the consumer is inclined to pay more attention to payment and advertising issues than in a real context. Furthermore, it must be assumed that the consumers who participated in the survey assumed that it would be clear which company the collaboration was with. Furthermore, from the investigation into the case, it has emerged that in 2017, Instagram developed a new advertising identification function for at least some of its users and that they then chose the design "Paid collaboration with ... [company name]". The fact that it is clear to the average consumer that payment is made for the post is, according to the Patent and Market Court, a condition for the consumer to understand that it is a marketing matter.

Overall, blog post 1, according to the Patent and Market Court, is not designed in such a way that, given the context in which it was published for the average consumer, after fleeting contact, it is clear that the post is marketing, which then means that the average consumer would be likely at least to appear to be capable of making an informed business decision.

Blog post 2 (the text below is from page 43)

The comparison material with excerpts from other blogs cited by Alexandra Media and Tourn Media shows that the use of terms such as "sponsored post", "sponsored by", "sponsored post" and "sponsored by" and similar terms is relatively common in marketing on social media. Like the lower court, the Patent and Market Court judges that the average consumer understands in its own right that the advertising identification "sponsored post" means that the post is paid and thus contains marketing. However, that the average consumer understands the meaning of the term is not enough. As already established, it is also required that the average consumer should note the advertising identification even on fleeting contact.

As regards this assessment, the Patent and Market Court considers the following circumstances. The "sponsored post" advertising tag has been placed on the third line of the post after the title and subheading. The identifier is written on a light pink strip that runs across the screen. The text has the same font size as the subsequent body text and thus a smaller size than the main text and subheads.

The fact that the identifier has not been placed at the beginning of the post, but only in the third line, and in addition in a significantly smaller font size than the main heading, means that the identifier does not attract the average consumer's attention to the extent that it is required, for example even when scrolling she should perceive that the post constitutes marketing. Even the color choice of the light pink strip means that the average consumer's attention is not directed to the advertising identifier, but to other more prominent parts of the post, such as the headline and images. Since the clarification that the post is in collaboration with Mobilpengar.se comes with small text and is last in the post this also cannot outweigh the stated deficiencies.

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