COMMENTS

Roger Mann

German Advertising Standards under Pressure from Europe

German advertising law—known for its tough standards—is coming more and more under the influence of European legislation, which is resulting in a slow but steady liberalisation. This is not so much as a result of the efforts of the German legislator to implement E.U. Directives but more because of the influence of precedents set by the highest German courts competent for civil law, the Bundesgerichtshof and the Court of Appeals (Oberlandesgerichte).

Unlike most areas of law in Germany (which is a civil law jurisdiction), advertising law mainly consists of case law based on some rudimentary statutory rules in the Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*, "UWG"), as interpreted by the courts. The main sections, § 1 and § 3 of this Act, read as follows:

> Any person who, in the course of business activity for purposes of competition, commits acts contrary to honest practices, may be enjoined from these acts and held for damages [§ 1].
>
> Any person who, in the course of business activity for purposes of competition, makes deceptive statements concerning business matters, in particular concerning . . . may be enjoined from making such statements [§ 3].

German courts and especially the Bundesgerichtshof in the past tended to be very restrictive in interpreting these regulations. The best-known example of this tendency is the "ten per cent test" for misleading advertising (§ 3 UWG): an advertisement is already considered to be misleading by German courts if only 10 to 15 per cent of the addressed average casual (passing) consumers would be misled. In most cases the courts decide this question without an opinion poll or other expert opinion, because the sitting judges consider themselves to be part of the class of addressed consumers. In the past this has led to judgments such as the one in which the claim "the most sold shaver brand in Europe" has been considered to be misleading, because a relevant group of the addressed consumers would believe that the leading brand in Europe would also be the leading brand in Germany.[1]

However, in 1998 the Bundesgerichtshof made several judgments which give hope to those who would welcome the loosening of the currently tight German standards.

Comparative Advertising

In February 1998 the Bundesgerichtshof decided a case where a dealer in tennis rackets advertised his products with the statement: "We do not expect you to buy cheap Composite Rackets."[2] The court considered this statement as comparative advertising along the lines of its own precedents. Until this decision the court had always decided that comparative advertising in principle violated § 1 of the UWG, which provides generally that whoever commits "acts contrary to honest practices" may be enjoined from these acts and held for damages.

The Bundesgerichtshof decided to overrule its own precedents and to implement the E.U. Directive on Comparative Advertising (97/55) itself by interpreting the general clause of § 1 of the UWG on the basis of the standards and requirements laid down by the Directive.

In this case this did not lead to a different result because the general discrediting of composite rackets was also a violation of Article 3a s. 1 lit. (e) of Directive 84/450 concerning misleading advertising as amended by the Comparative Advertising Directive. However, a new principle of the admissibility of comparative advertising was established.

The fact that the court did not wait for the legislator demonstrates its determination to draw consequences from legal developments at the European level. It is interesting to see how the court justified its decision to implement the Comparative Advertising Directive itself.

According to Article 5 of the E.C. Treaty, it is not only legislative authorities that are obliged to implement E.C. Directives, but all public authorities, including the courts. However, according to Article 189 s. 3 of the E.C. Treaty (old numbering), how to implement a directive is within the discretion of the Member States, and therefore of their legislative bodies. As a consequence, in principle, the courts may only implement a directive by applying it directly, if and when it has not been implemented within the implementation period. Although this period had not run out for the Comparative Advertising Directive when the Bundesgerichtshof reached its decision, it nevertheless felt authorised to implement the Directive by applying it directly. One reason given was that the "open" character of the general clause of § 1 of the UWG enables the courts to take into account changes in "honest practices". This also applies to changes on the European level. The court held that:

> behaviour which the European legislator has described as permissible in principle cannot—irrespective of the implementation period—be considered a violation of honest practices [by the German courts].

1 BGH [1972] N.J.W. 104.
2 BGH [1998] G.R.U.R. 824—*Testpreis-Angebot.*

According to the jurisdiction of the European Court of Justice, even before formal implementation, Member States have to refrain from any actions which would not be in accordance with a directive.[3] A judgment which did not take into account the contents of an (as yet) unimplemented directive might not be in accordance with such a directive. In the case of the Comparative Advertising Directive and the contrary German precedents, the Bundesgerichtshof held that only the direct application of the Directive ensured that its goals were achieved in time.

Although the Comparative Advertising Directive is rather restrictive itself and will therefore not have a revolutionary effect on German advertising law, the judgment reveals the influence of European legislation on this area of German law.

Misleading Advertising

This is even more important against the background that the European Court of Justice in 1998 confirmed that its standard for misleading material is an "average consumer who is reasonably well informed and reasonably observant and circumspect".[4] In this decision the court had to deal with a case referred to the Court by the German Federal Supreme Court for Administration Law (*Bundesverwaltungsgericht*) where the competent German foodstuffs monitoring authority had objected to the labelling of a package for eggs claiming "6 corn—10 fresh eggs". In fact the poultry was only fed with 60 per cent of 6-corn food, which the German foodstuffs authority considered as misleading on the basis of section 17 (1) (5) of the Act on Foodstuffs and Goods in Daily Use (*Lebensmittel- und Bedarfsgegenstandegesetz*) because in the light of such a claim consumers would expect that the poultry would be fed exclusively with such food. The German Federal Supreme Court for Administration Law considered Article 10 s. 2 lit. (e) of the Council Regulation 1907/90 of June 26, 1990 on certain marketing standards for eggs[5] applicable, which in principle allows statements designed to promote sales on packaging, provided that such statements and the manner in which they are made are not likely to mislead the purchaser. The German court referred three questions on the interpretation of Council Regulation 1907/90 to the ECJ under Article 177 of the E.C. Treaty, inquiring its opinion about the applicable consumer test. The "reasonably observant and circumspect" feature used by the ECJ in this decision differs in particular from the "casual" German consumer ("10 per cent test", see above). The court explicitly did not rule out that, under certain circumstances, a national court might decide, in accordance with its own national law, to order a consumer research poll in order to clarify whether a statement is misleading. In the absence of any Community provision, the national court may determine in accordance with its own national law the percentage of consumers misled which would be sufficiently significant to ban the use of a statement. However, the ECJ will examine decisions of national courts on the basis of its attentive consumer standard.

Already one of the most important courts of appeals (Oberlandesgerichte) as far as unfair competition is concerned, the Oberlandesgericht Hamburg has adopted the "attentive consumer test" as its new standard to examine whether an advertisement is misleading or not.[6] The court has even gone so far as to compare the ECJ decision of July 16, 1998 with an amendment to the German Act against Unfair Competition, and allows parties which have signed a negative covenant on the basis of the tougher "casual consumer standard" (10 per cent test) to terminate such undertakings with immediate effect. This is even more remarkable as the decision of the European Court of Justice did not set new standards but just confirmed earlier precedents,[7] and has not been held in the area of unfair competition law but in the area of administrative law. It will be interesting to see how other courts of appeals will decide this question. Hopefully this question of law will soon be brought before the Bundesgerichtshof.

"Exaggerated Enticement"

A further interesting set of decisions was handed down last year, when the Bundesgerichtshof had to decide about two advertisements for mobile phones, where the mobile phone was offered for free in one case[8] and for DM30.00 in another case,[9] but only in conjunction with a telephone contract.

On the basis of its previous decisions, one would have expected that the Bundesgerichtshof would have considered this kind of advertisement to be a so-called "exaggerated enticement", violating § 1 of the UWG. According to this group of case law, the combination of a very cheap or even free product with another is "exaggerated enticement", if the free/cheap product is only intended to entice customers to buy the other product. Under this rule the issuing of vouchers for free hamburgers has been considered to be a violation of honest practices, because customers may feel obliged to buy additional goods when cashing in the voucher.[10]

The Bundesgerichtshof denied an exaggerated enticement in the case of the mobile phone advertisements, using the remarkable reasoning that the addressed consumers are aware of the fact that mobile phones of a significant value are usually not just given away. Consumers realise that the mobile phone has to be financed and is therefore subsidised by the telephone contract. Therefore such an advertisement is permissible, as long as the conditions of the telephone contract are set out clearly in connection with the offered mobile phone.

Although the court did not refer to any European standards of consumer protection, these decisions of the Bundesgerichtshof clearly reveal a turnaround in the consumer image of the court: although it was not a

3 See Art. 191 s. 2 E.C. Treaty and ECJ [1998] W.R.P. 290.
4 ECJ, July 16, 1998 C-210/96 [1998] W.R.P. 848.
5 [1990] O.J. L173/5.
6 OLG Hamburg 28.1.1999—3 U 65/98; [1999] M.D. 687.
7 Such as C-362/88 *GB-INNO-BM*; C-126/91 *Yves Rocher*; C-315/92 *Verband Sozialer Wettbewerb*; C-470/93 *Mars*.
8 BGH [1999] W.R.P. 90.
9 BGH [1999] W.R.P. 94.
10 Munich [1991] W.R.P. 59.

misleading advertising case in the first instance, the court applied a consumer test which was based on an average informed and attentive consumer. One may look forward with interest to the next decision of the Bundesgerichtshof in the area of misleading advertising.

Act on Premiums

In another field of advertising law, the highest German court will soon have the opportunity to prove its new liberalised line: a well-known U.S. mail order house has advertised its lifelong unlimited guarantee for its products in Germany. On October 21, 1998 the Court of Appeal in Saarbrücken[11] considered this to be a violation of the Act on Premiums (*"Zugabeverordnung"*). Based on existing precedents, the court decided that such a guarantee, which may be triggered at any time for any reason, has a value of its own and is therefore an impermissible addition to the sold goods. The U.S. retailer has already announced that it will appeal against this decision. German experts see a good chance that the Bundesgerichtshof may wave good-bye to another of its long-standing principles.

Summary

The above shows that German unfair competition law is currently "on the move": the courts in Germany have implemented the E.U. Directive on Comparative Advertising (97/55), are applying a more liberal consumer image in cases of misleading and enticing advertising and are starting to liberalise their attitude to discounts and premiums.

On the other hand, in England regulations have been introduced to reduce unwanted cold-calling which make it illegal for companies to contact individuals if they have asked to opt out of taking unprompted calls from businesses. In Germany cold-calling is still in principle a violation of § 1 of the Act against Unfair Competition (see above), if a consumer has not agreed to be contacted (opt in). This gives hope that the different concepts of unfair competition law in Europe are approaching each other—even if from different angles.

DR ROGER MANN