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# World Trademark Review



## Unwanted attention

**Playboy and the perils of a successful brand**

Jonas Rechtsanwalts-gesellschaft mbH

# Supreme Court saves Rainforest Projects (and emotional advertising)

Brand owners must consider the risk of breaching unfair competition law when advertising their products. Luckily for advertisers, the Supreme Court has issued two decisions that relax Germany's stringent law in that regard

Advertising is one of the main, if not the main, means of communication used to increase public awareness of trademarks and the enterprises behind them. Besides the issues relating directly to intellectual property (eg, using a third party's sign or pictures in an advertisement), the legal issues that arise from advertising in Germany concern compliance with the Unfair Competition Act.

The act provides that an ad may not be misleading, excessively deceptive or denigratory of a competitor. Articles 3 and 4(1) require competitors to advertise their products and services on the market in a way that does not unreasonably influence customers' independent judgement and freedom of choice. These provisions prohibit practices that influence customers without actually misleading them. Article 5 determines the rules against misleading advertising while Article 6 sets out in detail what constitutes unfair competition in comparative advertising.

Atypically by German standards, the act is more or less based on case law. In July 2004 the German legislature amended the Unfair Competition Act to include a list of behaviours held by the courts to be in breach of the act. Unfortunately, what constitutes unfair competition under single standard provisions was not as well defined as breach under blanket clauses, which left room for the courts to determine further types of infringing behaviours. Accordingly, the law as amended in 2004 has been applied much as it had been before the amendments – that is, leaving it to the courts, through their special chambers, to determine whether a specific type of behaviour is in breach of the act.

The procedure to file a complaint on the basis of unfair competition is quick and simple: if a cease-and-desist letter produces no

result, the aggrieved party may apply to the regional court for a preliminary injunction.

## Emotional advertising

Drawing on the public's emotions to sell a product – for instance, by promising to give part of the profits to a good cause – is a form of advertising that is as popular in Germany as it is elsewhere. However, the prevailing view in the German judiciary was for a long time that this type of advertising was not permissible *per se* – and was even more problematic when the extent of the contribution to the charitable cause was not defined.

The courts' view was that using advertising this way exploits for competitive purposes consumers' feelings of pity or social responsibility, without any acceptable basis for doing so. This in turn transgresses the bounds of public policy as regards competition (ie, unfair canvassing), even if the ad concerned does not promote specific products. Thus, the courts considered it objectionable to combine social and ecological sponsorships with the marketing of products where there is no factual connection with the product advertised. Accordingly, the courts:

- barred a fast-food restaurant chain from promising to donate the proceeds of the sale of a particular product to a children's fund;
- prohibited a furniture retailer from advertising his commitment to distribute the day's takings among his employees; and
- enjoined an optician from mentioning his support of an organization for the protection of endangered species in an ad for sunglasses.

## Rainforest Project I and II

It is in this context that the Federal

Supreme Court had to decide on the permissibility under the Unfair Competition Act of two ad campaigns known as Rainforest Projects I and II. The two campaigns, broadcast in 2002 and 2003, appealed to the ecological and social conscience of the public by promising that the purchase of each crate of KROMBACHER beer would pay for the protection, with the cooperation of the World Wide Fund for Nature, of one square metre of rainforest in Central Africa (Cases I ZR 33/04 and I ZR 97/04 – *Rainforest Project I and II*).

Both ads were prohibited by the Siegen District Court and the Hamm Regional Court of Appeal on the grounds that they lacked transparency and were deceptive. The courts considered that the ads contained no information as to how the brewery intended to protect the rainforest; nor did they give details of the sums that would be given to fund the project. Moreover, the courts found the ads to be misleading, holding that the brewery promised more support to the project than it was capable of delivering.

The Supreme Court overturned these decisions. It found that consumers were not influenced in an unfair and misleading way, even if the brewer not only advertised its social commitment solely for marketing purposes, but also connected the degree of its commitment to sales turnover (ie, 1 beer crate = 1m<sup>2</sup> of rainforest). Further, the court held that there was no general obligation for the brewery to inform customers of how it would support the rainforest or the sum it would donate. The court ruled that in the 2004 amendments to the Unfair Competition Act, the legislature expressly decided against a general rule of transparency. Thus, an obligation to provide clarification could be assumed only if the ad was likely to influence consumers unfairly by deceiving them as to the real value of the

pledge. Social sponsorship of the kind advertised in the Rainforest Project ads provides consumers with an additional incentive to buy the product linked to the social project. As long as the maker of the product advertised does not promise any specific benefits relating to the extent and manner of the sponsorship, consumers would expect the advertiser only to provide some type of sponsorship which is not so marginal that its promotion is unjustified. In the case at hand, only if Krombacher had promised more support to the Rainforest Project than it actually provided, and in doing so had disappointed legitimate consumer expectations, could the ads be considered misleading under Article 5 of the Unfair Competition Act.

The Supreme Court remanded the cases back to the lower courts as they failed to establish the facts in this respect.

### Implications

A final Supreme Court decision allowing a link between advertising and social sponsorship (and more generally the use of emotional advertising) in Germany was overdue. The decision is in line with the EU-law concept of 'average consumer', as well as with rulings of the Federal Constitutional Court. In the *Benetton Case* (1 BvR 1762/95 – *Benetton I*), that court overruled for the first time the ban on image-building and emotional advertising against the background of the right to freedom of expression, which is established in the Constitution.

Following the Supreme Court and Constitutional Court rulings, combining social sponsorship with the sale of products is no longer considered anti-competitive in Germany simply because an ad appeals to consumers' feelings but has no factual connection with the product advertised or the business activities of the advertiser. As long as consumers are free to decide themselves on their motives for buying an advertised product, it does not affect competition on the market.

Moreover, it is hardly conceivable to limit the freedom of choice available to the well-informed, attentive and circumspect consumer. He or she can decide what he or she wishes to purchase, or whether he or she wishes to satisfy his or her sense of social responsibility by supporting a charitable organization.

### Summary

Following the *Rainforest Project* decisions, it is in principle permissible to link social sponsorship with the promotion of



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products under the Unfair Competition Act. An enterprise is under no general obligation to inform consumers precisely as to how or to what extent it wishes to commit itself to a social project. However, the boundaries of what can be classified as unfair competition are transgressed once the influence on the consumer has reached such a degree that it can affect that consumer's freedom of choice. Therefore, a connection between social sponsorship and the purchase of a product can be prohibited only if legitimate consumer expectations are not met. An ad can be considered misleading only if the undertaking behind it promises:

- more support to the social project than is given or is possible to achieve; or
- that the consumer can directly affect the amount given to the chosen cause.

Thus, the less the advertiser promises with regard to its support of a cause, the less likely it is that the ad will be considered misleading. [WTR](#)