

[DE] Federal Court jumps the gun in applying EC Directive on comparative advertising

IRIS 1998-7:1/7

*Alexander Scheuer
Institute of European Media Law (EMR), Saarbrücken/Brussels*

In a decision given at the beginning of February this year, the Federal Court (Bundesgerichtshof - BGH) abandoned its previous position that comparative advertising violated Section 1 of the Unfair Competition Act (Gesetz gegen den unlauteren Wettbewerb - UWG) and was thus on principal unlawful (see IRIS 1998-3:3). In reaching its decision, it relied on Directive 97/55/EC of the European Parliament and of the Council of 6 October 1997, amending Directive 84/450/EEC concerning misleading advertising (see IRIS 1997-10: 4), so as to include comparative advertising - and did so before the time allowed to Member States for implementation had expired.

The Federal Court was reviewing a case in which an injunction had been sought under Section 1 of the UWG. The plaintiff was sole German agent for an American sports goods manufacturer, specialising in golf and tennis equipment. The defendant, a tennis equipment supplier, had declared in advertisements that "We respect you too much to try selling you cheap composite (graphite-fibreglass) rackets". The plaintiff complained that this constituted disparaging comparative advertising.

The Federal Court agreed, but referred to Directive 97/55/EC in its decision. The general rules laid down in Section 1 of the UWG, covering the right to apply for an injunction or to claim damages in cases of improper conduct, must be interpreted in a manner consistent with the Directive - and the broad wording of those rules made it possible to do this even before the time-limit for implementation of the Directive had expired. The obligation of respecting Community law applied not only to legislative, but also to judicial authorities. It was true that this obligation did not exist as soon as a Directive was adopted, but courts should use their power to help shape the law by interpreting it and should disregard (divergent) case-law principles when - as in this instance - expiry of the deadline for implementation would in any case render them obsolete. The case-law of the Court of the European Communities made it clear that member states should take no measures incompatible with the aim of a Directive. Provided that national law could be interpreted in a manner compatible with Community law, this did not constitute interference with the legislator's activity. The provisions of Article 3, para.1, a to h of the Directive, indicating when comparative advertising was acceptable, must therefore be taken into account. The statement complained of in this case was totally disparaging. The Federal Court held that it violated Article 3,

para. 1e, since it presented rival products as being of poor quality.

Urteil vom 5. Februar 1998 -- I ZR 211/95.

BGH Judgment of 5 February 1998 - I ZR 211/95.

