[DE] Koblenz Appeal Court on Protection of Telephone Directory Entries

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Replying to an application for a temporary order, the Koblenz Appeal Court (Oberlandesgericht - OLG) decided on 27 October 1998 that in future no telephone directories may be sold in CD-ROM format without the telephone subscribers' prior permission.

The applicant, a computer software manufacturer, who also produced a CD-ROM telephone directory with which subscribers could be identified by means of their telephone number, neighbourhood searches could be carried out and business numbers found, had been prohibited from selling these CD-ROMs by means of an injunction. As a result of this, she had obtained from the Mannheim District Court (Landgericht) an order banning a producer of similar CD-ROMs from selling them. However, this order had been ignored.

The applicant had claimed before the Koblenz District Court (Landgericht - LG) that, by selling the CD-ROMs, the defendant had broken competition regulations. The Court had dismissed the complaint on the grounds that there was no concrete competitive relationship between the parties.

In the appeal before the OLG , the defendant had submitted a declaration of discontinuance with a penalty clause, which the applicant had accepted. After both parties had agreed on the settlement of the case, the Appeal Court had decided that the costs should be borne by the defendant, not only because of the declaration she had made but also because, on the basis of the substance of the case and the arguments put forward, the overwhelming evidence suggested that the applicant's wish had finally been met and that she therefore had a right to forbearance under §1 of the Unfair Competition Act (Gesetz über unlauteren Wettbewerb - UWG).

The Court ruled that the defendant had broken the rules on unfair competition and had breached §4.1 and §43 of the Federal Data Protection Act (Bundesdatenschutzgesetz - BDSG) and §27 of the Criminal Code (StrafgesetzbuchStGB). The defendant had not infringed the provisions of §4 and §29 of the Data Protection Act, since these only prohibited the processing and use of personal data whereas she had merely sold copies of the CD-ROM. However, in the Appeal Court 's opinion, by selling the CD-ROMs the defendant had enabled

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third parties to violate the Data Protection Act and was therefore punishable under §27 of the Criminal Code as an aider and abettor for the transmission and use of data. The Appeal Court did not consider that the defendant had been given consent to use the data (§4.1 BDSG) nor permission under the terms of §29 of the Data Protection Act. The infringement of §4 and §43 of the Data Protection Act and §27 of the Criminal Code also constituted an offence under §1 of the Unfair Competition Act, since only by imposing the same legal restrictions on all competitors could equal conditions be created for fair competition. There had been a breach of competition law in this case in particular because the Data Protection Act's provisions were not value-free and irrelevant to competition law, but enshrined certain values, protected individual rights and laid down moral legal requirements. The Court also granted the applicant's claim that competition law had been violated since there had in fact been a concrete competitive relationship with the defendant. Such a relationship existed even if the competition was in the future and, since the injunction was not yet in force, future competition could certainly not be ruled out. The Appeal Court said that the objection over abuse of the law did not rule out the applicant's claim for an injunction, since the applicant was not currently breaking competition rules herself by selling the CD-ROMs.

In the meantime, the applicant has lost a case brought before the Federal Supreme Court (BundesgerichtshofBGH), in which she appealed against the order that she refrain from selling the CD-ROMs.

Beschluß des OLG Koblenz vom 27. Oktober 1998; Az. 4 U 1196/98.

Judgement of the Koblenz Appeal Court (OLG Koblenz), 27 October 1998; file no. 4 U 1196/98.

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