[DE] Federal Supreme Court Confirms Shock Advertising Ban

IRIS 2002-2:1/30

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The Bundesgerichtshof (Federal Supreme Court - BGH) has again ruled on the admissibility of so-called "shock advertising" under competition law. In its judgment of 6 December 2001, it prevented the defendant, a press firm, from printing an advertisement for the Benetton company, depicting a person labelled as "HIV Positive", on the grounds that it was immoral within the meaning of Article 1 of the Gesetz zum Schutz gegen den unlauteren Wettbewerb (Unfair Competition Act - UWG) and was therefore unlawful.

The BGH had reached the same verdict in a previous judgment of 6 July 1995 (I ZR 180/94). This ruling had been overturned after the defendant appealed to the Bundesverfassungsgericht (Federal Constitutional CourtBVerfG), which ruled on 12 December 2000 that the ban breached the fundamental right to freedom of expression enshrined in Article 5.1 of the Grundgesetz (Basic Law). It referred the case back to the BGH for a new ruling (see IRIS 2001-2: 13). The Constitutional Court said that the right to freedom of expression could only be restricted on the grounds of important public interests or the rights of third parties. It thought that confronting the reader with unpleasant or pitiable images was not sufficient to justify such a restriction. The BGH had also considered that the "HIV Positive" advertisement amounted to a serious breach of human dignity, protected by Article 1.1 of the Basic Law, since it branded AIDS sufferers and portrayed them as being excluded from human society. The Constitutional Court argued that an equally valid interpretation was that the advertisement was actually a condemnatory reference to the danger that HIV sufferers might be or were already excluded. It said that the BGH should have considered these alternative possible interpretations and indicated the reasons for its decision in order to comply with Article 5.1 of the Basic Law. Since it had failed to do so, the case was referred back for retrial.

In its decision of 6 December 2001, the BGH admitted that the advertisement could be interpreted as an expression of solidarity with HIV carriers. It would therefore not infringe competition law if that were the only possible interpretation or if its character as a simple commercial advertisement were seen only by a small proportion of the targeted public. This, however, was not the case, according to the BGH. Rather, the advertisement, even if it could also be interpreted as an appeal for solidarity, would be seen by the overwhelming majority as drawing attention to the company named in the advertisement. That

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company would therefore be exploiting AIDS sufferers, their affliction and their stigmatisation by society for its own economic advantage. The people portrayed and their fate would be used as a means of generating commercial profit. The advertisement was therefore immoral within the meaning of Article 1 of the UWG and did not warrant protection under the principle of freedom of expression because it harmed the dignity of AIDS sufferers. The defendant should not, therefore, have published it, according to the investigation. A press firm was only legally responsible for an advertisement if it was clearly recognisable as being in gross breach of competition law. The BGH ruled that this was the case where the "HIV Positive" advertisement was concerned.

Urteil des Bundesgerichtshofs vom 6. Dezember 2001 Az.: I ZR 284/00

Ruling of the Federal Supreme Court, 6 December 2001; case no. I ZR 284/00

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