[DE] Ruling on Undercover Investigation of Surreptitious Advertising

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On 20 January 2005, the Munich Obe rlandesgericht (Court of Appeal - OLG) dismissed a complaint by a management consultancy company against a journalist. The plaintiff had made a claim for an injunction, information and damages because the defendant, while investigating an allegation of surreptitious advertising in an ARD evening series, had used business documents belonging to the plaintiff and a secretly filmed video. The video shows a female employee of the plaintiff in a sales meeting with syndicate representatives, offering to place certain themes or products in the series in return for payment.

In May 2004, the Landgericht München (Munich District Court) had ruled that the defendant should not use the plaintiff's business documents and the video recording. The OLG lifted this decision and dismissed all the plaintiff's claims.

The Court decided that the allegation of surreptitious advertising could only be substantiated by means of an undercover investigation. Furthermore, the plaintiff could not claim that a confidentiality agreement had been breached because such an agreement was invalid under Art. 138 of the Civil Code (BGB) and the plaintiff therefore had no right to protection. The illegal nature of such an agreement was clear from the fact that surreptitious TV advertising constituted a breach of Art. 7.6 of the Rundfunkstaatsvertrag (Inter-State Broadcasting Agreement - RStV) and Art. 10.4 of the Television Without Frontiers Directive. Furthermore, surreptitious advertising also infringed Art. 1 of the Gesetz gegen unlauteren Wettbewerb (Unfair Competition Act). Even an offer to sell surreptitious advertising was an illegal act. The plaintiff's activities were not simply advisory in nature, but constituted an unambiguous offer to deliberately incorporate products in the TV series in return for payment. The claim for an injunction should be rejected because the freedom of the press, which was a basic right, held more weight than the rights of the plaintiff. In situations where there was no other way of veryifing a suspicion, the scope of protection enshrined in Art. 5.1 of the Basic Law (GG) covered unlawfully researched information. Since public service broadcasting was financed by means of the licence fee, it was particularly important for the public interest that abuses connected with illegal surreptitious advertising should be brought to light.

As a result of the journalist's research, which has now been published, the illegal practice of product placement on television has come under public scrutiny. The

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placement of particular brands and products in programmes is illegal if it is done for advertising purposes. Such a purpose exists if money changes hands or if the product is given a degree of prominence that cannot be justified by editorial considerations.

OLG München, Urteil v. 20.1.2005 - Az.: 6 U 3236/04

http://www.kanzlei-prof-schweizer.de/bibliothek/urteile/index.html?id=12676&suchworte=

Munich Court of Appeal, ruling of 20 January 2005 - case no.: 6 U 3236/04

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