

[DE] Product placement in films - Federal Court sets the rules

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In a judgment given on 6 July 1995, the Federal Court ruled that product placement in cinema films is permissible, provided that the audience is made aware of it beforehand, and at latest in the opening credits. The judgment concerns the film, *Feuer, Eis und Dynamit*, which tells the story of an eccentric millionaire and features a number of sports events. The teams appearing are company teams, and the names and symbols of the companies concerned are displayed on their clothing, equipment and other items (e.g. skis, bicycles, beverages). At least a fifth of the film's production costs were covered by the firms featured in it, and some of them were also licensed to use it for advertising purposes. According to the court, this meant that the making and showing of the film served, objectively and subjectively, to improve the competitive position of third parties. The fact that featured names, trade marks and products formed part of the story made no difference. The firms concerned had paid substantial sums to have their products promoted in the film, and the film-makers had accordingly set out to do this. This constituted a breach of Section 1 of the Unfair Competition Act - not because it violated the legal rule that public and private broadcasters must separate advertising and programme material (which did not apply to film makers and distributors), but because advertising must be made clearly recognisable when, and in so far as, the audience concerned did not expect it.

The decision as to whether audiences must be told that the film includes paid advertising has nothing to do with prohibiting the sale of a film which is a work of "art" within the meaning of Article 5 of the Basic law (*Grundgesetz*), but merely with prohibiting a certain mode of sale which affects neither the nature of the work nor the artist's creative freedom. The relevant principle here is the individual's constitutional right, under Article 2 of the Basic Law, to free development of his own personality, which includes freedom from manipulation. Making it a rule, under Section 1 of the Unfair Competition Act, that the audience must be informed, before a film is shown, of its special advertising character would thus seem consistent with the constitution. In interpreting the concept of "morals" in Section 1 of the Act, attention must also be paid to what the Basic Law has to say on competition. A film which contains paid advertising can also be "art" within the meaning of Article 5, para. 3, first sentence of the Basic Law. Artistic freedom is not restricted by law, but is restricted by the constitution, and particularly by Article 2, para. 1 (general freedom of conduct) and Article 1, para. 1 (human dignity) of the Basic Law. These principles are compromised when the

individual finds himself confronted with advertising in a situation where he has no reason to expect it and from which he cannot simply withdraw. Exercise of the basic right to artistic freedom is not unduly restricted by the film-maker's being required to make it clear to the audience that the film they are going to see contains paid advertising, when and to the extent that this exceeds the expected level. He is not required to make changes either in the film itself or in the intended mode of presentation.

Urteil des Bundesgerichtshof vom 6. Juli 1995, I ZR 58/93, I ZR 2/94, 34 S., 10 S.

Judgment of the Federal Court of 6 July 1995, I ZR 58/93, I ZR 2/94, 34 S., 10 S.

