[DE] Use of Image for Third-Party Advertising Breaches Own Image Rights

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Ruling on an appeal, on 5 November 2013 (case no. 15 U 44/13), the Oberlandesgericht Köln (Cologne Appeal Court - OLG) decided that an actress's own image rights can be breached if a picture from a film is used in an electrical chain store's advertising brochure without the necessary permission.

The OLG therefore confirmed the ruling of the Landgericht Köln (Cologne District Court - LG) of 20 February 2013 (case no. 28 O 431/12). An action had been brought after a picture of the actress appeared in an electrical chain store's advertising brochure. A double-page spread in the brochure showed three television sets, the screens of which contained a still image from a film in which the character played by the plaintiff was visible. The image also contained the film title and the words "Available on DVD and Blu-ray".

The actress had complained that this use of her image was unlawful. She had only given permission for her image to be used to promote the film, not to advertise third parties and their products and services. The defendant, however, had claimed that the plaintiff's image had, in view of the layout of the brochure pages and the advertised products, only been used to advertise the DVD and Blu-ray editions of the film.

The LG Köln disagreed and ruled in the actress's favour. If the image from a film had primarily been used to advertise another product (in this case, television sets), it could not be assumed that the actress had given her permission. In this case, the actress was entitled to an injunction against the company concerned under Articles 823 and 1004 of the Bürgerliches Gesetzbuch (Civil Code - BGB) in conjunction with Articles 22 and 23 of the Kunsturhebergesetz (Artistic Copyright Act - KUG), to information under Article 242 BGB and to compensation under Articles 823 and 249 BGB. The OLG agreed with the LG's decision: the use of her image for advertising purposes infringed the actress's general privacy rights, in particular her own image rights which, in addition to the non-material aspects of the privacy rights, included the right to determine whether and how her own image was commercialised and, in particular, used for advertising purposes. The fact that the television sets pictured in the advertising brochure appeared with product and price information pointed unmistakably to the promotional nature of the presentation of these products.

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The publication and distribution of the image without the plaintiff's permission was also prohibited under Article 23(1) KUG, according to which such publication and distribution was only permitted if it met a legitimate public right to information. Advertisements that - as in the present case - only served the business interests of a company using an image in its advertising did not fulfil such a right. Even if an exemption under Article 23(1)(1) KUG were admitted, the plaintiff's right to privacy would, in the weighing up process, take precedence over the public's right to information, which had been asserted by the defendant.

The LG had rightly ordered the defendant to disclose information, since details of the type, length and scope of the commercial use of the image were needed in order to calculate a fictitious royalty payment. The plaintiff was entitled to demand a fictitious royalty payment for unjust enrichment under the terms of Article 812(1)(1)(2) BGB.

The OLG therefore fully rejected the electrical chain store's appeal. No further appeals were allowed.

Urteil des OLG Köln vom 5. November 2013 (15 U 44/13)

http://www.schertz-bergmann.de/aktuelles/131105_OLG-Koeln-15U44-13.pdf

Ruling of the Cologne Appeal Court, 5 November 2013 (15 U 44/13)

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