[DE] Nuremberg Appeal Court on Inadmissibility of Multiple Cautions

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In its final judgment of 12 November 2013 (case no. 3 U 348/13), the Oberlandesgericht Nürnberg (Nuremberg Appeal Court - OLG) ruled that an application for an injunction against a company, and for reimbursement of the cost of issuing a caution following a breach of the obligation to publish legal information on an Internet platform (in this case, Facebook), was inadmissible under Article 8(4) of the Gesetz gegen den unlauteren Wettbewerb (Unfair Competition Act - UWG) if, taking all the circumstances into account, it represented an abuse of the law. The court considered that an abuse of the law was particularly committed if the only reason for issuing the caution and applying for an injunction was to generate a claim for reimbursement of expenses or of the costs of taking legal action against the contravening party.

In the case at hand, an IT company had, via a law firm, sent to other companies at least 199 cautions regarding breaches of the obligation to publish legal information, enshrined in Article 5 of the Telemediengesetz (Telemedia Act - TMG), in the space of eight days. One of the companies cautioned had refused to comply with the caution and had therefore been the subject of court proceedings. The court decided that the company issuing the cautions had abused the law if the multiple cautions issued bore no reasonable relation to the commercial activity of the company concerned.

In the OLG's opinion, an abuse of the law did not depend purely on the number of cautions issued. Rather, all the circumstances of the individual case should be taken into account. However, one of the indications that Article 8(4) UWG had been violated was the fact that the company issuing the cautions had, other than in two pending cases, failed to assert an injunction claim through the courts. Another indication of an abuse of the law was if the company issuing cautions had developed software that could be used to easily find cautionable service providers. If the company issuing cautions also had no significant economic interest in taking legal action for the breach of competition law, this was also a clue that the cautions represented an abuse of the law.

Regarding the question of economic interest, the court emphasised the weak financial position of the company that had issued the cautions. Its ordinary share capital had been EUR 25,000. Before the cautions were issued, the company had made a profit of EUR 41,000. Since issuing the cautions had allegedly cost EUR

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53,000 in lawyers' fees, the court thought this alone pointed to the existence of an abuse of the law. In addition, 200 court procedures would have cost in the region of EUR 250,000. Consequently, the claims made were inadmissible under Article 8(4) UWG.

Endurteil des OLG Nürnberg vom 12. November 2013 (Az. 3 U 348/13)

http://medien-internet-und-recht.de/pdf/VT-MIR-2013-Dok-096.pdf

Final judgment of the Nuremberg Appeal Court of 12 November 2013 (case no. 3 U 348/13)

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