

[DE] Court of Appeal in Karlsruhe on Television Advertising Using an Impersonator

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In a judgment delivered at the end of January, the Court of Appeal (Oberlandesgericht - OLG) in Karlsruhe has ordered a manufacturer of dairy products to pay damages amounting to DEM 155,000 to a singer on the grounds of infringement of his personality rights.

In a commercial for its products, the company first showed an actor dressed in Russian costume, then a well-known actor and entertainer. Whereas in the second case the artist himself did indeed announce the advertisement and was paid the amount he claimed for his participation in the commercial, the first part unfortunately showed an impersonation of him. His engagement had become too expensive for the advertising agency producing the commercial. According to the findings of the Regional Court in the initial proceedings, which the OLG endorsed in its decision, a not inconsiderable number of viewers must nevertheless have been convinced that it was in fact the singer who was advertising the product.

In 1994 the OLG had originally upheld the singer's complaint. It was true that the complainant could not claim a monopoly over the general image of a Russian, and hence the stereotyped, exaggerated representation of such a character could not be fundamentally prohibited. It should therefore make no difference here that it was not an original image of the well-known person which was being used without his consent but 'only' a - deceptively similar - impersonation for the purpose of the commercial, thereby creating a connection with the product. An appeal against this original judgment on a point of law was not upheld by the Federal Supreme Court (Bundesgerichtshof - BGH).

The OLG then, in order to have the original judgment enforced, had to decide on the damages to be awarded to the complainant, which should be seen in terms of the amount the singer would have received if he had given his consent.

In order to calculate a reasonable payment, the OLG had to take into account on the one hand the advertising value of the complainant, and on the other the amount of fees paid to the actor. In determining advertising value a scale of points was - apparently - used for the first time, reflecting the fame and popularity of the well-known person. On this scale the complainant rated well on fame, but his popularity rating was comparatively low. Combining these figures with the values the actor and entertainer achieved on the scale as worked out by a

specialist and the payment made produced the amount of damages indicated.

