

GERMANY



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1. Topic:	Cancellation Notification in Distant Selling Agreements
Where:	Court of Appeals, Berlin
When:	2006
Facts:	<p>A distant seller of goods operating through eBay referred to his standard terms of business, which stated a term of two weeks within which a consumer/buyer could cancel the sales contract (abandonment).</p> <p>The term of abandonment in distance selling agreements is regulated by § 312 lit. d Para. 1 and § 355 of the German Civil Code (BGB) and is normally two weeks (§ 355 Para. 1, second sentence). However, the term is one month if the information – which must be submitted in “text form” – is submitted only <u>after</u> conclusion of the agreement (§ 355 Para. 2, second sentence).</p> <p>The Court of Appeals held that the information in “text form” had not been received in time. According to § 126 lit. b BGB, the “text form” requirement, if submitted via the internet, is only met if the information is actually perpetuated by the receiving customer, be it in the shape of a printout of the page or as a download, i.e. storage on the recipient’s hard disk. The seller is however, normally unable to prove this form of receipt. Accordingly, the “text form” requirement is only met if the text has been sent to the recipient via e-mail or fax. However, in business areas such as eBay, the goods are advertised with a binding offer in the meaning of the law, which means that an acceptance by the consumer results in a binding purchase agreement. Hence, the information regarding the right to abandonment is received <u>after</u> and not before conclusion of the agreement. In most of these cases, the information is sent via e-mail or together with the delivery of the goods, rendering the term of one month (§ 355 Para. 2, second sentence) applicable.</p> <p>In addition, since the two-week term of abandonment was, in the case at hand, wrong and therefore misleading, the seller had not properly informed the consumer about his right to abandonment. In those cases, however, according § 355 Para. 3 BGB, the right to abandonment does not end at all.</p>
Comments:	<p>Distant sellers must have regard to the fact that the mere option for the consumer to read the information regarding the right of abandonment on the internet or the seller’s standard terms of business does not meet the “text form” requirement (because not “sent”). In addition, the provision of such information on the internet or in standard terms of business is nevertheless required according to § 312 lit. c Para. 1 BGB and § 1 of the Civil Code Information Regulation</p>

2. Topic:	Keyword Advertising: Courts still indifferent; Metatags
Where:	Higher District Court of Düsseldorf (Court File I-20 U 79/06)
When:	Judgment dated 23 January 2007
Facts:	<p>After Germany's Federal Court of Justice (BGH) has decided the dispute whether Metatags infringe trademark law in Germany and confirmed the prevailing opinion that the use of trademarks or company names of third parties in the Metatags of a website is a trademark infringement (decision dated 18 May 2006, Court file I-ZR 183/03), many have thought that the courts would unanimously adapt this decision for keyword purchase cases (keyword advertising via the google tool "AdWords"). Instead, the Higher Court of Düsseldorf stressed its independent position and denied both a trademark infringement as well as a violation of the law against unfair competition (UWG) in general.</p> <p>As a coincidence, at the same time, a US District Court almost used the same arguments in a similar case (Wentworth v. Settlement Funding, Civic Action No. 06-0597 (E.D. Pa. Jan. 4, 2007). Although internet users would be guided to advertisements of the defendant, such users would not be confused by the offer, as the link to defendant's website is not displayed within the search results but separately (above the search results or besides) and, further, the users would understand and know that the information provided in these areas are of commercial character and do not demonstrate a certain relation to the trademark protected keyword. While the German court denied the "use as a trademark", the U.S. Court confirmed the constitution of trademark use, but refused to grant the claim due to missing likelihood of initial interest confusion. Particularly in cases, where the information displayed in the advertisement contains the identity of the advertising entity, the internet users would not be confused.</p> <p>With a slightly different argumentation Düsseldorf further denied a violation of the Act against Unfair Competition. A misuse of the reputation of the trademark protected keyword would require a transfer of the trademark's reputation to the defendant's advertisement and its goods and services (so called transfer of image). As the public could clearly see that the advertisement is not one of the trademark owner, such an image transfer shall be out of question.</p>
Comments:	The author expects the jurisdiction and especially the Federal Court of Justice to adapt its Metatags rules for keyword advertising as well. As with Metatags, the Higher District Court of Düsseldorf's opinion on keyword advertising will most likely not prevail, as the aspect of canalising the internet users to its own website by using third parties' trademarks and similar rights is nothing but using third parties' trademarks for own business purposes; and this is exactly what the European harmonised trademark law tries to prohibit. However, it might take its time until a keyword advertising case has to be decided by the Federal Court of Justice. Thus, until then trademark owners should sue keyword buyers before other courts such as Cologne or Braunschweig, which are trademark owners' friendlier in this respect.

3. Topic:	Social Sponsoring
Facts:	<p>Recently Renate Kühnast, former Minister of Environment in Germany, made No.1 news headlines by calling on consumers to buy Toyota's new hybrid car to contribute to the reduction of carbon dioxide emissions. Although heavily criticized, Ms. Kühnast hit a nerve: in Germany's saturated markets, appealing on the environmental and social responsibility of consumers is increasingly en vogue, often secondary to price and quality aspects. Examples are manifold. Lidl, a well known discounter, entered into cooperation with a "fair trading organization", introducing "fairly traded" products to the mass market. Ikea emphasizes that its products are manufactured without using child labour. Businesses often advertise their sponsoring of schools, sports clubs, NGOs or environmental organizations.</p>

	<p>Strangely enough, the German saying “Tue Gutes und rede darüber” (do good and talk about it) did not work well with German courts. German courts originally banned advertising that appealed to the social conscience. A furniture retailer was prohibited from advertising his commitment to give a whole day’s revenue to his employees (Supreme Court – BGH, 29.11.1990, GRUR 1991, 545). The manufacturer of sanitary products could not promote his sponsorship of a German environmental organization (Higher Regional Court Cologne – OLG Köln, 08.01.1993, WRP 1993, 346 ff.), and a producer of chocolate candy bars was not allowed to present his cooperation with the WWF (Higher Regional Court Stuttgart – OLG Stuttgart, 18.09.1998, WRP 1999, 456). Consequently, an advertisement of a brewery, saying that with the purchase of each beer crate, 1 m² of the rain forests in Central Africa were effectively protected, was barred (Higher Regional Court Hamm – OLG Hamm, 12.11.2002, GRUR 2003, 975). In all of these cases, the courts held that there was no acceptable connection between the social engagement and the advertised products. The advertising was held objectionable due to an unfair moral and psychological impact.</p> <p>However, reviewing the above decision of the court in Hamm, the Supreme Court recently changed the jurisdiction on social sponsoring fundamentally. It set up new evaluation guidelines (BGH, 26.10.2006, WRP 2007, 303; BGH, 26.10.2006, WRP 207, 308): The decision can be summarized up as follows:</p> <ul style="list-style-type: none"> - The Supreme Court referred to an earlier decision issued in 2005. In the case “Artenschutz” (protection of species), the Court held that the requirement of an objective connection between the advertised product and the marketing claim was no longer valid. Thus, an optician was allowed to refer to his support of an organisation for the protection of endangered species in his advertisement campaign for sunglasses (BGH, 22.09.2005, GRUR 2006, 75). - This new position was broadened in the above mentioned “brewery-cases”. The court held that even in those cases where a manufacturer did not only advertise his social commitment for image purposes, as in the case “Artenschutz”, but also connected the degree of his commitment to the actual sales turnover (1 beer crate = 1 m² rain forest), the consumers were not influenced in an unfair and illegal manner. - The Supreme Court went even further. It additionally held that the manufacturer did not have to inform the consumer in full how and to what degree he was to commit itself. As long as the manufacturer did not advertise a precise degree of sponsorship, it held the consumer only expected a commitment that was significant enough to be mentioned. Only if the consumer was misled in that respect, a connection between social sponsoring and a sales promotion could be prohibited. <p>This decision was overdue. It resolves the uncertainties connected with social sponsoring. The notion of undue influence on a customer by appealing to his or her social conscience is not in line with the European concept of an educated consumer. Further clarification is necessary, though. The Supreme Court shifted the line of argumentation to the question of deception, leaving open which degree of social engagement is required to justify its use in advertising. It will be the task of the lower courts (Instanzgerichte) to provide further guidelines.</p>
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<p>4. Background - Germany</p>	
<p>Civil Law Environment:</p>	<p>The German civil law system (as opposed to common law) is set forth in a number of major codes (Civil Code, Commercial Code, Tax Code, Criminal Code, Codes of Civil, Criminal and Administrative Procedures). Principal statutory laws provide further rules for all private and commercial sectors (including, for example, the Law Against Unfair Competition containing principal advertising rules). In addition, there are a large number of regulations</p>

	and ordinances in each of these sectors of law (including, for example, Price Declaration Regulations etc). Where statutory law contains “general clauses” which are subject to interpretation (to a large extent found in the fair competition and advertising sector), case law is providing supplementary guidance.
Dispute Resolution:	The courts specialize in civil/commercial, criminal, public administration, labor, social, tax and constitutional matters. Civil courts have special patent, trademark, copyright and unfair competition benches. There are, in principle, three review instances (second and third instance partly for review of law, only), namely the entry courts (local or district courts), the appeal courts and the several Federal Supreme Courts in civil and criminal, public administration, labor, social and tax matters, plus the Federal Constitutional Court. Most judges are in a life time civil service status. Arbitration and mediation provide well developed supplementary dispute resolution options.
Procedures and Costs:	Under the Civil Procedure Code, a complaint must contain full statements of facts and offers of evidence supporting these facts (documents, names of witnesses, offer to rely on an expert opinion). There is no pre-trial discovery, the court collects and considers evidence only in respect of facts in dispute which contributes to quick and low cost dispute resolution. Officers and Directors are considered “party” and do not qualify as witnesses. Regular court proceedings take about 9 to 12 months in each instance. Litigation costs are composed of statutory attorneys’ fees and court costs. Both are regulated by statute, the amount depends on the value of the case (fees and costs are determined on the basis of graduated fee schedules).The losing party pays all costs and legal fees. Litigation is comparatively inexpensive if fees are based on the statutory schedule. Lawyers may charge their clients (higher) fees based on hourly rates if agreed in writing.
Injunctive Relief:	Injunctive relief is available in quick injunction procedures. A prior cease and desist request is required unless such prior warning would jeopardize the effects of an injunction or seizure. A case qualifies for injunctive relief only if court assistance is urgent. If the plaintiff knows the relevant facts for more than about one month they normally do not qualify (some courts accept knowledge of up to six months). Ex parte injunctions (rendered without prior oral hearing) are subject to “opposition” of the defendant in which case the court will hear the case in an oral hearing. Injunctions rendered on the basis of on oral hearing are subject to one appeal.
Lawyers, Notaries:	Although German lawyers have traditionally practised in relatively small offices, and were instructed mainly for dispute resolution purposes, the past 15 years have seen a change towards legal planning and advisory services. In addition to the majority of small practices, there are large groupings in international and large independent national firms. Notaries belong to a separate legal profession, notarisation is required in certain corporate, real property and matrimonial transactions where the notary assumes responsibility for the legal effectiveness of the contract or transaction.