

Rechtsprechung

Rechtssachenbeschreibung

Nationale Kennung: Coaching-Newsletter

Mitgliedstaat: Deutschland

Gebrauchliche Bezeichnung: N/A

Art des Beschlusses: Gerichtsbeschluss im Rechtsmittelverfahren

Beschlussdatum: 19/05/2011

Gericht: BGH

Betreff:

Kläger:

Beklagter:

Schlagworte: comparative advertising, competition, unfair commercial practices, unfair competition

Artikel der Richtlinie

Misleading and Comparative Advertising Directive, [Article 4](#) Misleading and Comparative Advertising Directive, [Article 5](#)

Leitsatz

(1) Comparative advertising pursuant to §6 UWG does not only require mentioning a competitor or the product or service of a competitor in an advertisement, but must also indicate that the competitors offer different, but interchangeable and substitutable products or services.

(2) A blanket devaluation or discrediting of a competitor is deemed to be unfair under comparative advertising law when the concrete circumstances, practices or behavior to which the devaluation/discrediting refers are not also presented factually and objectively in the consumers' interest.

Sachverhalt

The first plaintiff is a registered association of career coaches. The second plaintiff is president of this association and also provides coaching services. He consults or coaches leaders, entrepreneurs and their teams, particularly in the area of self and team management, time and goal management, life and career planning, and dealing with personal and career crises. The defendant also offers coaching services and publishes a monthly newsletter on the internet by emailing it to 27,000 coaches. The readers are directed from the email to the defendant's website in order to read the newsletter. The defendant's website also contains offers for the defendant's coaching services.

In the March issue of the newsletter an article appeared in which the plaintiffs were negatively represented as coaches. One article referred to plaintiff as a "negative example" of a coach and the other implied generally that her coaching was more like a religious cult.

Plaintiffs filed to have defendant refrain from distributing any newsletters mentioning the plaintiff or linking to articles that discredit plaintiffs. Defendant defended himself with a free-speech argument and claimed he was merely linking to articles, which are protected by free speech, and that he provided a neutral market assessment.

The lower appellate court granted plaintiffs' claim. Defendant appealed.

Rechtsfrage

(1) Does comparative advertising merely involve mentioning a competitor's service or product in an advertisement?

(2) Under comparative advertising law, is it permissible for a competitor to express a blanket and discrediting comment about a fellow competitor?

Entscheidung

The court held that when commenting on a business competitor, and this comment does not allow the reader to formulate or reach an objective and factual conclusion, then the freedom of speech protection is not as important as the protection imbedded in comparative advertising and fair commercial competition law.

The court discussed how, if an advertisement discredits a competitor, the court will make an overall assessment of the advertisement and consider the particular circumstances of the case, the content and form of the advertisement and criticism of the competitor, how successful the advertisement was commercially, and the average understanding of the targeted consumers (in the case at hand - the readers of the newsletter).

Additionally, the court held that the defendant, in linking to the 2 articles, took on their perspectives as his own - by including them in his newsletter, they represented his opinion. That means that they are no longer neutral market assessments protected by free speech, but instead are part of defendant's business practices because they are linked to his website offering his coaching services.

The court also discussed that when evaluating the discrediting of a competitor, the court looks at how useful the information is to the receivers of the information, if there is a justification for the information, if the criticism is presented in an objective, scientific way, and how much the competitor is actually discredited.

Furthermore, when balancing the rights within the law of comparative advertising with the right to freedom of expression, the court looks at whether it has to do with a private disagreement, whether one party is pursuing its own interests, or if it in connection with a meaningful public issue (political, economic or cultural concern of the general public). Therefore, an expression of an opinion (i.e. discrediting a competitor) that simultaneously serves a commercial interest is more strictly scrutinized than an expression, which is not subject to fair business law behavior but instead to tort law.

Finally, the court found that it matters greatly whether it is a blanket discrediting of a competitor without listing concrete and specific reasons for discrediting

the plaintiff. It is in the interest of the consumer to be informed about concrete defects, drawbacks and this might allow, in some cases, for negative comments about a competitor. These comments, however, must contain only what is necessary to protect the consumer and must be factual. Moreover, to justify a discrediting representation of a competitor, it must be that without this discrediting, the consumer could be damaged or violated. A vague and blanket criticism, without concretely pointing out specific grievances, does not justify the massive detriment caused to the competitor.

URL: <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?>

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Volltext: [Volltext](#)

Verbundene Rechtssachen

Keine Ergebnisse verfügbar

Rechtsliteratur

Keine Ergebnisse verfügbar

Ergebnis

The defendant's appeal of the lower appellate court's decision (Oberlandesgericht Köln) is denied.