Siebeke Lange Wilbert

A comparable approach? German and EU perspectives on comparative advertising

The idea of comparative advertising being assessed equally within the European Union under a harmonised unfair competition law has gone awry

Anyone involved in, or affected by, comparative advertising in Germany needs to be be acquainted with the different approaches taken by the European Court of Justice (ECJ) and the German Federal Court of Justice.

Background

Comparative advertising has a long history. From a legal perspective, its story is one of re-emergence, characterised by upturns and downturns.

A century ago, the comparison of products in advertisements was not regarded as problematic, but in Europe, this view was to change considerably. Until the 1970s, comparative advertising was treated as an illegal market practice in many European jurisdictions and was largely forbidden. In Germany and France, it was considered an unfair practice and was prohibited unless advance notification was given to the competitor in question; while in Belgium and Italy, the explicit identification of competitors was banned. Spain and the Netherlands permitted only limited comparative advertising. Compared with its European neighbours, the United Kingdom had a reputation for taking a relaxed approach.

The European Union first addressed the issue in the late 1970s, proposing that comparative advertising should be legal if it provided verifiable details and was neither misleading nor unfair.

However, the first effective step was not taken until 1997, in the form of the EU Comparative Advertising Directive (97/55/EC). This has been followed by several further directives – most recently the EU Advertising Directive (2006/114/EC) – all aiming for further harmonisation of the law on comparative advertising within the European Union.

Different focus of interests

Nonetheless, recent cases in Germany and at EU level have revealed increasingly divergent approaches in terms of competition policies and the weighting of the different interests involved. Even though the interests being considered are the same, the ECJ appears to apply the concept of unfair advertisement with a slightly broader scope than the Federal Court of Justice.

Section 6(2) of the Unfair Competition Act was implemented on the basis of Article 4(g) of the Advertising Directive – the so-called 'perfume clause'. It can be interpreted in accordance with the principles underlying the directive and the interests affected by comparative advertising. The latter factors include the manufacturer's interest in protecting branded goods or services against exploitation of reputation, as well as the interests of the advertiser's other competitors, the interests of consumers and the general public's interest in undistorted competition.

In the past, the German courts have generally interpreted Section 6(2) rather restrictively, in the context of the presentation of goods or services as imitations or replicas, in order to prevent consumers from being denied information on comparisons of branded goods with equivalent products. Previous judgments indicated that in order for a comparative advertisement to be deemed unfair, a clear case of imitation had to be demonstrated. Federal Court of Justice Decision I ZR 169/04 (December 6 2007) on imitation in advertising indicated that it was not enough to argue that a consumer might merely assume imitation or replication in the circumstances or in light of a particular knowledge of the competitor's product. This decision was the result of a policy that comparative advertising should be regarded as admissible in principle, as it allows consumers to be better informed of the comparative advantages and disadvantages of goods and services, as long as the comparison refers to essential, relevant, verifiable and typical features and is not deceptive. This approach supports the recital of the Comparative Advertising Directive.

ECJ – a broad scope of application

In *L'Oreal v Bellure* (C-487/07, June 18 2009) the ECJ stated that the particular object of the condition laid down in the EU Misleading Advertising Directive (84/450/EEC) was to prohibit an advertiser from stating that the product or service that it is marketing constitutes an imitation or replica of the product or service covered by the trademark. Paragraph 75 of the ECJ's judgment makes clear that this covers not only advertisements that explicitly evoke the idea of imitation or reproduction, but also those that, having regard to their overall presentation and economic context, are capable of implicitly communicating such an idea to the public. Paragraph 76 states that it is irrelevant whether the advertising indicates that it relates to an imitation of a product as a whole or merely to the imitation of an essential characteristic of that product.

The ECJ clearly took a more trademark owner-friendly approach in this decision by pointing out that the presentation of goods or services as imitations or replicas is already to be regarded as unfair if the advertising message merely suggests an imitation or replica – messages that in certain circumstances and on overall impressions are capable of indirectly communicating an idea of imitation to the public should be prohibited. Also, the

question of whether such a claim of imitation refers to the branded product as a whole or merely to an essential characteristic seems to be irrelevant.

This approach reflects a broad interpretation of the concept of comparative advertising in favour of trademark owners, prompting the question of whether it might be detrimental to a consumer's interest in being informed, in as transparent a way as possible, of comparable products.

Germany – overt claim of imitation

Although current German jurisprudence is consistent with the ECJ's approach, the emphasis is still on an explicit exposure of the advertiser's product being an imitation or replica of the branded product. The presentation should be open: an explicit and noticeable claim of imitation.

In its decision in the *Oracle* case (I ZR 94/07, October 2009), the Federal Court of Justice noted that in order for the corresponding German regulation to apply, an explicit identification of the advertised product or service as an imitation or replica is not required. However, the representation as an imitation or replica must be more than a mere assertion of equivalence; rather, it must be clear from the advertising message that the advertised product is to be perceived as an imitation or replica of a competitor's branded product. Such requirement of an overt or clearly noticeable claim of imitation was manifested in the wording of the directive that was implemented into Section 6(2) of the Unfair Competition Act – the relevant passage of the directive uses the word 'present' in the English version and '*présente*' in the French version. This argued for an interpretation of the directive that would require a clearer and more explicit advertising message.

This line of argument was followed in a recent decision of the First Civil Court of Appeal (Federal Court of Justice, I ZR 157/09, May 5 2011). In *Creation Lamis* the court held that trading in imitations of branded products must not be regarded as unfair comparative advertising in the sense of Section 6(2) of the Unfair Competition Act where there is no clear claim of imitation, but merely an association with an original product.

In this case the advertiser offered low-price perfumes under the trademark CREATION LAMIS. The scents of the advertiser's products were similar to those of certain more expensive branded perfumes. The complainant argued that the offering, advertising and distribution of the imitation perfumes should be treated as unfair comparative advertising, as the products were identifiably imitations of the originals.

The court noted that the German regulation in question is not intended to prohibit the imitation of original products. Unfair comparative advertising does not occur where the original product is merely discernible in view of packaging or designation if the advertising message simply evokes an imitative association. Rather, there must be a clear claim of imitation, so as to lead the consumer to believe the advertiser's product to be a clear imitation of the original. The question of whether there is a clear and distinct claim of imitation must be evaluated exclusively from the consumer's point of view.

This differentiation in interpreting the presentation of goods and services as imitations or replicas reflects a different degree of liberalisation of the common market, which is one of the principal features of the directive. However, whether a comparative advertising message is to be regarded as admissible or unfair is sometimes more difficult to assess where the requirements for unfair comparative advertising are interpreted broadly.

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Impact on generic drug advertising

The issue also has an impact on the advertising of spare parts and accessories, as well as generic drugs. Once patent and design rights have expired, the question arises as to whether these products may be advertised as equivalent products that are not 'imitations or replicas' in the sense of Section 6(2), or whether it would make sense to allow such generic drugs to be advertised as imitation products once patent and other ancillary rights have expired – the more so as it is difficult, if not impossible, to distinguish between advertising messages expressing clearly that the original product is taken as an example and those which are a fair indication of the equivalence of the products.

This issue has not been completely resolved by either the German courts or the ECJ, but in view of the growth of the generic drug market, it seems certain to come before the courts again. WTR