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Wettbewerbszentrale News (WBZ = Centre for Protection against Unfair Competition)

**Case 1:****News - 09.03.2016 // Cosmetic advertising – Federal Court of Justice (German: *Bundesgerichtshof*, BGH) on requirements for the verifiability of advertising claims**

Although it must be possible to substantiate advertising claims relating to cosmetic products on the basis of adequate and verifiable evidence, they do not necessarily have to be regarded as being scientifically validated/ proven. This emerges from a ruling recently handed down by the Federal Court of Justice (BGH) (judgement dated 28.01.2016, ref. I ZR 36/14¹ – Moisturising/ hydrating gel reservoir). In its ruling, the court gave a detailed opinion concerning the requirements to be imposed regarding the verifiability of effect claims for cosmetic products.

It was disputed between the parties – both manufacturers of wet razors with interchangeable blades – whether the powder located in a container above the blades in the defendant's wet razors and which combines with water to form a gel when used, leads to a prolonged moisturising effect on the shaved skin. The defendant had referred to this in its advertising, e.g. with statements such as "moisturises directly" ("*spendet direkt Feuchtigkeit*")². The plaintiff had regarded these statements as being anti-competitive and was seeking a cease-and-desist order.

The Regional Court (German: *Landgericht*, LG) of Cologne (Köln) had found in favour of the plaintiff (upheld the compliant). The defendant's appeal against the ruling was unsuccessful. The Upper Regional Court (German: *Oberlandesgerichte*; OLG) of Cologne found that the moisturising effect of the gel was not proven. For proof of the accuracy of the advertising claims, the court had based its deliberations on the principles concerning the permissibility of health-related claims and found that an active supply of moisture from the gel into the skin could not be regarded as being scientifically validated³ (Upper Regional Court of Cologne – *OLG Köln*, judgement dated 31.01.2014, ref. 6 U 119/12).

The Federal Court of Justice finds this standard of evidence/ proof to be excessively strict. With regard to the requirements contained in no. 3 of the annex of Regulation (EU) no. 655/2013⁴, advertising claims concerning cosmetic products should (only) need to be substantiated by way of adequate and verifiable evidence, with it also being possible to employ other types of evidence in addition to expert reports/ assessments insofar as such evidence takes account of the state of the art (practices). The Federal Court of Justice points out that, contrary to the view of the court of appeal, it cannot be required that the

¹ <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=f9f1d340580ee1c5299aef0c8acd2de5&nr=73916&pos=0&anz=1>

² The ad had claimed that that the gel reservoir contained hydrating gel with aloe vera and vitamin E that would hydrate the skin during the shaving process.

³ The Court had held that the claims in question had to be examined applying the high standards developed for health claims on foodstuffs in the context of Regulation (EC) No. 1924/2006 (on nutrition and health claims made on foods). In essence, the scientific evidence provided by the defendant could not meet these high expectations and was thus deemed inadequate/ insufficient.

⁴ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2013:190:0031:0034:en:PDF>

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advertising claims must be regarded as being scientifically validated/ proven. It therefore referred the case back to the Court of Appeal for a new hearing and decision. The Upper Regional Court of Cologne (OLG Köln) will now have to re-assess the advertising claims, taking this less strict standard of evidence/ proof into consideration.

The legal basis for the decision is Art. 20 of Regulation (EC) no. 1223/2009 on cosmetic products. According to this regulation, no wording or texts, terms, trademarks, illustrations, pictures and figurative or other signs may be used in the labelling, making available on the market and advertising of cosmetic products which imply that these products have characteristics or functions which they do not have. It is a special aspect of misleading and, therefore, unfair commercial practices which, in the view of the Federal Court of Justice, has precedence over the general prohibition of misleading commercial practices under Article 5 of the German Law against Unfair Competition (UWG). Furthermore, this provision represents a market conduct rule within the meaning of Article 3a of the German Law against Unfair Competition.

The Cosmetics Regulation is accompanied by Regulation (EU) no. 655/2013 "laying down common criteria for the justification of advertising claims used in relation to cosmetic products". In the annex, the Regulation contains, among other things, guidelines for the verifiability and provability of advertising claims for cosmetic products.

G-Regs note:

2 key points from the BGH decision:

1. Confirms that the burden of proof falls on those making the claim (i.e. the advertiser). The BGH felt that Section 3 (Evidential Support) of the Annex to Regulation No. 655/2013 justified placing the burden of proof on the user of the advertising claim. Sect. 3 emphasizes the importance of scientific evidence for claims:

- Advertising claims require adequate, verifiable evidence that takes into account state of the art practices (Points 1 and 2)
- Studies used as evidence shall be relevant for the product and the claimed benefit, follow well-designed and well-conducted methodologies and respect ethical consideration (Point 3)
- The level of evidence or substantiation shall be consistent with the type of claim being made (Point 4)

According to the BGH, these rules all presuppose that the user of advertising claims is required to be able to substantiate his own claims.

2. The higher standard of evidence (in relation to scientific substantiation) as developed for health claims on foods under Reg. 1924/2006⁵ is not applicable to claims on cosmetic products.

The BGH held that the Annex to Reg. 655/2013 clearly accepts different types of evidence and provides for a variance in the standard of evidence, depending on the nature of the claim and state of the art practices. Whilst a single expert assessment may be sufficient in some instances, in cases where evidence affects the safety of the end user/ consumer, a higher standard is required. As a result, there is not one standard of evidence applicable across all types of claims for cosmetic products, but instead the quality and amount of evidence needed varies on a case by case basis, taking into account the nature of the claims, its implication on consumer safety and the relevant state of the art practices (see

⁵ In particular Art. 6(1): requiring that "nutrition and health claims be based on and substantiated by generally accepted scientific evidence")

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BGH para. 19). In this “hydrating reservoir gel” case, the BGH found that the defendant could not be required to scientifically prove the claimed benefit and therefore the case was referred back to OLG Koln to apply lower standard of evidence.

The principle of proportionality prevents the stricter principles for health claims from being applied to Cosmetics (para. 20 BGH). The

Case 2:**News 13.02.2015 // Results of a satisfaction test are not proof of an anti-ageing effect**

Cosmetic companies recognises the cease and desist order (injunctive relief) of the *Wettbewerbszentrale* (Centre for Protection against Unfair Competition)

The German subsidiary of a French cosmetic group advertised its “Age Control concentrate” with the claim “proven anti-ageing effect”. 50ml of this serum costs around €100.00. The *Wettbewerbszentrale* objected to the advertisement on the grounds of it being misleading on account of consumers expecting scientific evidence of the effect. A number of women were in fact asked for their assessment. The mere subjective feeling of a small number of women surveyed does not, however, represent scientific substantiation of an “anti-ageing effect” in the view of the *Wettbewerbszentrale*.

In addition, the *Wettbewerbszentrale* objected to the absence of any reference concerning the satisfaction test cited by the cosmetic group as proof. According to well-established case law, it is unfair for test results to be used in product advertising if it is not pointed out to consumers where they can obtain more detailed information about the test. Consumers should, as is customary for product tests, also be able to understand in the case of consumer tests how a verdict was reached. In the view of the *Wettbewerbszentrale*, it is especially necessary to provide more detailed information for consumer surveys, which can be completely different in terms of their design, form and significance. This emerges from Article 5a, Paragraph 2 of the German Law against Unfair Competition, under which essential information may not be withheld from consumers.

After the date of the oral proceedings of the Regional Court of Munich, the company acknowledged the cease-and-desist claim, resulting in a judgement by consent being issued (Regional Court of Munich I, judgement by consent dated 10.02.2015, ref. 33 O 8254/14). (F 4 0149/14) ck

Case 3:**Press release: 11.10.2000 // Consumer deception in the advertising of cosmetic products.**

In a ruling handed down on 23.08.2000 - 2 U 1749/99 – the Upper Regional Court of Thuringen prohibited a cosmetic company from advertising a bath salts product line at the request of the *Wettbewerbszentrale*.

Health, wellness and fitness are very popular among consumers. The needs generated by this have led to an equally large and competitive market for cosmetics and personal care products. To promote their own sales, manufacturers of cosmetic products use the increased health awareness of consumers as an opportunity to refer to a medical effect when advertising their own products. However, such products do not always keep the promises made in the advertisement, as the case ruled on by the Upper Regional Court of Thuringen shows:

The company has advertised its product line with the claim that each individual product was enriched with the “medicinal salt of the Dead Sea”. In the view of the *Wettbewerbszentrale*, the consumers addressed in this manner had to assume that the cosmetic product itself displayed a medical, i.e. healing and preventive effect against diseases. However, this was, in fact, not the case on account of the extremely minimal

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concentration of the "Dead Sea salt" added to the product, as an expert examination had revealed.

The Regional Court had already prohibited the corresponding advertising in the first instance. The appeal to the Upper Regional Court of Thuringen by the company was unsuccessful. The Upper Regional Court finds in this regard that the company, by referring to the addition of "medicinal salt", aroused the impression in consumers that the bath additive in the pack size marketed by the defendant already developed a medical effect. However, the expert report obtained by the court had shown that the added concentration of the salt was so small that no medical effect whatsoever could be detected. By clearly linking the well-known therapeutic effect of the salt from the Dead Sea with the company's product, the consumer was ultimately being deceived.

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