
ADVERTISING

LAW

in Europe

and

North America

edited by
James Maxeiner
and

Peter Schotthöfer

Kluwer

Advertising Law in Europe and North America

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and
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(Editors)

1992

Kluwer Law and Taxation Publishers
Deventer · Boston

Kluwer Law and Taxation Publishers
P.O. Box 23 Tel.: +31 5700 47261
7400 GA Deventer Telex: 49295
The Netherlands Fax: +31 5700 22244

Distribution in the USA and Canada
6 Bigelow Street
Cambridge, MA 02139 / USA
Tel.: +1 617 354 0140
Fax: +1 617 354 8595

Library of Congress Cataloging-in-Publication Data

Advertising law in Europe and North America / James R. Maxeiner and Peter Schotthöfer. (editors).

p. cm.

Includes index.

ISBN 9065446036

1. Advertising laws—Europe. 2. Advertising laws—North America.

I. Maxeiner, James R., 1952— II. Schotthöfer, Peter W., 1948—

KJC6580.A885 1991

343.4'082—dc20

[344.0382]

91-39018

CIP

The chapters on Austria, Denmark, the European Community, France, Germany, Italy, Netherlands, Portugal, Spain and Switzerland and the Appendices are based on chapters which originally appeared in Peter Schotthöfer (ed.), *Handbuch des Werberechts in den EG-Staaten, Österreich, Schweiz und USA* (Cologne: Otto Schmidt Verlag, 1991).

ISBN 90 6544 603 6

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ADVERTISING LAW
IN EUROPE AND NORTH AMERICA

Preface

Advertising is becoming more international. Advertising campaigns increasingly use similar themes or even the same advertisements in more than one country. As cable and broadcast television, newspapers and periodicals increasingly cross frontiers, the national advertisements they carry become, if only inadvertently, cross-frontier advertising. Consequently, advertisers and their attorneys need to be aware of the advertising laws in more than one jurisdiction.

This book responds to the practical needs of advertisers engaged in multinational marketing. It seeks to provide lawyers and laymen alike with initial orientations in the laws governing advertising in 16 different jurisdictions: the Member States of the European Community (EC), the EC itself, Switzerland, Austria, the United States and Canada. In the interest of retaining a handy size and comprehensibility for laymen, it purposely does not seek to be exhaustive.

This book has been inspired in part by recent developments in Europe. Upon completion of the single market of the European Community on December 31, 1992 there will be opportunities for multinational marketing such as before did not exist. Multinational advertising will increase. Ironically, however, the laws governing advertising in Europe for the moment remain largely national. There is thus an increased need for knowledge of national laws.

This book is based on a similar book published in German earlier this year by one of the editors, P. Schotthöfer, *Handbuch des Werberechts in den EG Staaten, Österreich, Schweiz und USA* (Cologne: Otto Schmidt Verlag, 1991). This book is not, however, a mere translation of the German book. All the chapters for the English-speaking countries have been specially written for this book; a chapter for Canada has been added. All the other chapters of the original German-language book have been updated and completely reworked to respond to the requirements of English-language readers.

The English-language edition adopts a standardized format that permits immediate comparison of the laws of the different countries. Thus, for example, comparative advertising is treated uniformly in § 13 of each chapter. Non-standard sections which treat subjects not treated in every national chapter, are designated with an 'A,' e.g., § 9A Mandatory Use of the French Language, a section found only in the chapters for France and Canada. The diversity of the subject matter treated in each section did not permit imposing identical subsection schemes on each section, so that the subdivisions of each section, while basically similar, are not identical.

In view of the multinational audience of the book, the use of abbreviations has been kept to a minimum. Such abbreviations as are used are introduced in full at the point where first used. The most important ones are also repeated in § 29 Bibliographic Note of the relevant chapter.

PREFACE

The book contains two appendices drawn from the German-language edition. One is on conflict of laws and the other on international treaties. The inclusion of the appendix on conflict of laws, which is the law that deals with the choice of law that governs resolution of a dispute, reflects the importance of dispute resolution for advertising law generally. Conflict of laws is especially important for advertising, since the different jurisdictions surveyed in this book utilize a great variety of procedures for resolving advertising law disputes. Indeed, the substantive laws of advertising among the countries surveyed are probably more similar than are the preferred means of dispute resolution, which include methods as disparate as industry self-regulation, ordinary civil procedure, criminal procedure, administrative procedure and private warning procedure.

The law stated in the book is that current as of July 1, 1991. The new Belgian Law, effective March 1, 1992, is covered. In keeping with the practical purpose of the book, legislative proposals not yet in force are mentioned, if at all, only briefly.

We would like to express our appreciation to Dr. Erik Valters of New York for his work in making initial translations of original German-language texts.

James R. Maxeiner and Peter Schothöfer

New York and Munich, August 1991

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About the European Advertising Lawyers' Association EEIG

The contributors to this book work together in the European Advertising Lawyers' Association, EEIG, a European Economic Interest Grouping under European Community law having its headquarters in Munich. The members cooperate in informing each other and members of the public about developments in advertising law in their respective countries. The European Advertising Lawyers' Association EEIG and its members have presented a number of international seminars on advertising law.

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I. Introduction

§ 1. Legal Framework: Austrian and German Law

Much of Austrian competition law corresponds closely to German competition law. In the interest of brevity, this chapter refers to the chapter on German law whenever there is substantial agreement between Austrian and German law, and describes Austrian law in detail only as required to distinguish the two. While the phrase used below, 'as in Germany,' means there is a substantial similarity between the two laws, it does not necessarily mean that the two laws are identical. There may be differences in details or in court decisions. In some instances, there may be no reported Austrian decisions and it is assumed that German decisions would be followed.

Austria, unlike Germany, is not a member of the European Community, so EC law does not apply.

§ 2. Sources of Law

Austrian competition law regulates individual competitive breaches in a series of particular factual situations. These particular factual situations are found both in the Law Against Unfair Competition [Gesetz gegen den unlauteren Wettbewerb (UWG)] as well as in other laws, including the Promotional Gifts Law [Zugabengesetz], the Law Concerning Price Discounts (Rebate Law) [Gesetz über Preisnachlässe (Rabattgesetz)], the Clearance Sale Law [Ausverkaufsgesetz], the Local Distribution Law [Nahversorgungsgesetz], the Cartel Law [Kartellgesetz] and the Price Law [Preisgesetz].

In addition to these particular factual situations, § 1 of the Austrian Law Against Unfair Competition (which is identical to § 1 of the German Law Against Unfair Competition) creates claims for cessation and for compensation against anyone who 'in the course of business activity for purposes of competition commits acts contrary to ethical practices.' In addition, § 2(1), which is almost identical to § 3 of the German law, prohibits deceptive practices. (Both German provisions are reprinted in Germany § 30 below.) Austrian court decisions apply the law against deception as strictly as do the German. They place the burden of ambiguity on the advertiser and establish as the criterion of deception the understanding of the average casual observer.

AUSTRIA

Section 32 of the Austrian Law Against Unfair Competition authorizes issuance of implementing regulations. On the basis of this provision, a great number of merchandise labeling regulations have been issued (e.g., Food Labeling Regulation [Lebensmittelkennzeichnungsverordnung]). Violations of these regulations constitute violations of § 1 of the Law Against Unfair Competition, since it is contrary to ethical practices that someone should obtain competitive advantages over law-abiding competitors by not observing legal rules.

§ 3. Constitutional Protections

Government restrictions on advertising find their limits in constitutionally guaranteed rights. Most important of these are the rights to property, free speech, freedom of the press and freedom to exercise one's profession. The European Convention for the Protection of Human Rights and Fundamental Freedoms also has constitutional rank in Austria and similarly limits government restrictions on advertising.

II. The Substantive Law Regulating Advertising

A. Controls on Methods of Advertising

§ 4. Identification of Advertising

a. Editorial advertising. Announcements, recommendations and other contributions and reports, which are placed in periodicals in exchange for payment, must be characterized as 'advertisements,' 'paid-for insertions' or 'advertising' unless their commercial nature is clear from the format or the arrangement. § 26 of the Media Law [Mediengesetz].

b. Product placement. A lack of court decisions precludes a reliable statement whether product placement is legal in Austria.

§ 5. Restrictions on Direct Advertising

a. Outdoor advertising. Billboard advertising is permitted in principle. However, it is restricted by public law, e.g., nature conservation and building regulations.

b. Street solicitation. Is generally prohibited, as in Germany. See Germany § 5b.

c. Telephone advertising. Is generally prohibited, as in Germany. See Germany § 5c.

d. Facsimile advertising. Is generally prohibited. See Germany § 5d.

e. Direct mail advertising. Is generally permitted, as in Germany. See Germany § 5e.

f. Mailing unordered merchandise. It is generally prohibited, as in Germany. See Germany § 5f.

g. Door-to-door advertising. The visiting of private persons by so-called 'representatives' is prohibited by the Commercial Regulation [Gewerbeordnung] with respect to a variety of goods (e.g., food products, textiles, watches), and is otherwise permitted only within limits. Impermissible visiting can also become subject to proceedings under § 1 of the Law Against Unfair Competition (UWG).

h. Using customers to advertise for new customers. Progressive customer advertising (snowball system) is generally prohibited, as in Germany. See Germany § 5h. Lay advertising (referral system) may be improper, as in Germany. See Germany § 5i.

§ 6. Television and Radio Advertising

Regulations that govern advertising generally also apply to broadcast advertising. In addition, the public broadcasting network (ORF) imposes some of its own restrictions. These include limits on total advertising time and restrictions on advertisements for certain products. For example, advertisements for tobacco products and for hard liquor are prohibited. Advertisements for other alcoholic beverages are subject to restrictions, they must not be addressed to youth or auto drivers or have sporting contents. Other restrictions of broadcast advertising include limits on use of children in advertisements.

Austria has signed, but has not yet ratified the European Convention on Transfrontier Television (see European Community § 6), so that the Convention does not yet apply.

§ 7. Prize Competitions

Section § 28 of the Law Against Unfair Competition (UWG) prohibits sales that resemble games of chance, i.e. a sales system in which the purchase of the goods or services is a precondition for participation in a lottery or the like with the possibility of gain. Prize competitions that are intended to draw attention of customers to the product or to the organizer are, in principle, permitted. Applicable rules correspond to those developed by the courts in Germany. See Germany § 7.

§ 8. Promotional Gifts

Promotional gifts are goods or services that are offered, advertised or provided free of charge or only at a nominal price in addition to the main goods or services. Promotional gifts are generally forbidden. Exceptions similar to those in Germany exist. See Germany § 8. The prohibition of promotional gifts contained in § 1 of the Austrian Promotional Gifts Law [Zugabengesetz] corresponds to that in § 1(1) of the German Promotional Gift Regulation [Zugabeverordnung]. In Austria, as in Germany, this prohibition encompasses offering, advertising and giving away promotional gifts. However, in Austria, in the exceptions to the prohibition, the law distinguishes between giving away gifts (§ 3) and advertising the giveaways (§ 2).

The following types of promotional gifts are generally permitted, although in certain circumstances they might be prohibited as rebates: a definite amount of money which is not included with the goods or services; a definite quantity of the same goods or services; information or advice; and customary accessories for the goods and services. Certain other promotional gifts are generally permitted, provided that the giveaways are neither advertised (even on the package) nor offered as such. These include: samples of merchandise; promotional products characterized as such by visible and permanent designation on them of the enterprise; and miscellaneous items of low value. The Austrian Promotional Gifts Law does not expressly prohibit designating gifts as being free of charge, in contrast to § 1(3) of the German Promotional Gift Regulation.

Attempts are sometimes made to circumvent the prohibition of promotional gifts by tying two products together. The delimitation of permissible from impermissible tie-ins is difficult and depends on the circumstances of the individual case. Court decisions in Austria appear to be becoming more severe.

Court decisions also treat with reserve so-called lead-in offers, where additional merchandise is offered at particularly favorable prices together with the main product. If a not inconsiderable number of those exposed to this advertising buy the main product solely in order to acquire the additional merchandise, i.e., if the lead-in offer induces them to make irrationally-motivated buying decisions, the lead-in offer is impermissible.

§ 9. Cooperative Advertising (Joint Advertising)

Cooperative advertising is allowed. All participants are liable for any infringements of fair competition even if only the product of one partner is concerned.

B. Controls on Content of Advertising

§ 10. Price Advertising

a. Price display. Whoever in the course of business sells goods to end consumers is required to display the prices demanded. § 11 of the Price Law

[Preisgesetz]. For certain service establishments, among them restaurants and gasoline stations, there is a similar obligation to display prices. Violations of these provisions are actionable by competitors using § 1 of the Law Against Unfair Competition (UWG). The Unit Price Labeling Regulation [Grundpreis- auszeichnungsverordnung] also regulates price display. According to the Unit Price Labeling Regulation, sellers of certain packaged food products and chemical consumer goods to end users are required to display unit prices if the goods are intended for self-service and, in any case, if on the basis of other laws or regulations they are required to be marked with weight or volume. For food products, the unit price is the price for one kilogram or for one liter; for chemical consumer goods, it is the price for 100 grams or 100 milliliters. The obligation to display unit prices is inapplicable only where weights or volumes are equal to fractional quantities specified in the regulation or to certain multiples of the weight or volume stated.

b. Rebates. Originally the Austrian Law Concerning Price Discounts (Rebate Law) [Gesetz über Preisnachlässe (RabattG)] was identical to its German counterpart. Subsequent amendments in both countries, however, have brought about differences in details. In particular, the Austrian amendments of 1988 led to significant differences. The 1988 amendments permit granting price discounts (3%) for cash payments to individual end consumers. In order to put an end to the practice of using *agents provocateurs* to persuade businessmen to grant impermissible rebates and then to use the rebates as causes for bringing lawsuits, under the 1988 amendments the granting of illegal rebates is subject to private suits only if the violator advertises the rebate in public announcements intended for a larger circle of persons. However, all illegal rebates remain subject to penalty as administrative infractions.

c. Special offers. Individual goods that are different from other product lines may be offered as special offers under particularly favorable conditions unless this would constitute a special event (e.g., a clearance sale). See § 11 below. The author also considers limitations in time permissible.

d. Loss leaders. As in Germany, loss leaders are permitted under certain circumstances. See Germany § 10.

e. Recommended prices. Section 12 of the Cartel Law [Kartellgesetz] prohibits advertising manufacturers' recommended prices, unless there is an explicit reference to the nonbinding character of the prices. Prohibited in any case is exertion of economic or social pressure to enforce recommended prices.

f. Restriction on advertising price reductions. The Austrian Law Against Unfair Competition has no provision corresponding to § 6(e) of the German law. Court decisions, however, are strict, when comparisons are made between one's own prices and 'list prices,' and require that it be clear with which prices the comparisons are being made, even for casual observers. It is not permissible to use one's own (higher) prices that were valid only for short periods of