

Beware of "Abmahnungen"

by Dr Roger Mann

Dr Roger Mann is Resident Partner at the London office of the German law firm Redeker Schön Dahs & Sellner and co-author of a Lawyers Handbook of Practising Unfair Competition Law ("Anwaltshandbuch Wettbewerbspraxis", Hrsg. Walter/Grüber, Verlag Dr. Otto Schmitt, Köln 1998).

Before joining Redekers he was in-house counsel of the German publishing house Gruner + Jahr.

Lawyers and insurance companies have one thing in common: they tend to draw pictures of dangers against which they offer protection. However, sometimes simple advice may save a lot of money. If you have ever been confronted with something called an "Abmahnung" in Germany, you should know what I am talking about. In this situation you should at least know how to react.

What are "Abmahnungen"? There is no English translation, because there is no equivalent legal instrument in English law. You could describe an "Abmahnung" as a warning letter which in most cases is sent by a competitor (or his lawyer) who thinks that you are violating the German law against unfair competition, which mainly governs unfair advertising practices. A consumer organisation or a trade association may also send such a document. Whenever you or the staff of your German operation receive this kind of warning letter you had better react very quickly, otherwise very expensive court proceedings might be on their way.

How do you recognise an "Abmahnung"? In such a warning letter the warning party usually describes the advertising which it alleges breaches German law against unfair competition and requests the other party to sign an undertaking to stop the behaviour objected to immediately, otherwise a contractual penalty will be due.

Often the warning covers more than just the attacked advertising but describes the attacked behaviour in a more general manner. There are a lot of provisions which might seem strange to someone used to English advertising standards, such as the restrictions on giving discounts or extras to customers. This is not the place to list all such regulations. But you should be very cautious and not sign any undertaking without seeking legal advice in German law, especially if the allegedly violating advertising is described in a more general manner. Once you have signed the undertaking the contractual penalty may be triggered for every further use of the advertising described in the letter.

On the other hand the decision to sign or not to sign the undertaking has to be made quickly. German law allows competitors to set deadlines of a few days or, in very urgent cases, even hours. As soon

as the deadline has run out, the complainant (e.g. competitor, consumer or trade association) may ask the competent court for injunctive relief. If the court considers the attacked behaviour to be a violation of German law against unfair competition, it will issue an ex parte injunction. In this situation legal fees and court fees will already have accrued. The party which loses the case at the end of the day will have to bear all fees and costs, and reimburse all statutory fees paid by the plaintiff.

According to German civil procedure law, legal fees and court costs are calculated on the basis of the value of the subject matter of the dispute. As German courts tend to fix the subject matter value in unfair competition cases at quite a high level (subject matter values of £80,000 are not uncommon) the fees and costs involved are also quite high. Thus defending against an "Abmahnung" is only advisable if the advertising objected to is significant and/or has been an expensive investment (e.g. involving costs of catalogues, radio or TV spots) and the chances of success are reasonable.

How can you avoid "Abmahnungen" and unfair competition litigation when advertising and marketing in the German market? You cannot avoid them completely because it is part of the concept of German unfair competition law that competitors issue such warnings. Advertising complaints in Germany are governed by a very fast and powerful judicially administered system. However, you can substantially reduce the risk if a specialised lawyer examines any advertising before it is used on the German market. If you expect warning letters, for example because there is very tough competition in your market and you want to try a "risky" campaign, your lawyer could submit protective briefs ("Schutzschriften") to those courts from which your competitors would most likely seek injunctive relief. This should at least ensure that the court does not make an ex parte order and gives you a hearing.