

Deutsche Vereinigung
für gewerblichen Rechtsschutz
und Urheberrecht e.V.

Deutsche Vereinigung für gewerblichen Rechtsschutz und Urheberrecht
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Sitz Berlin
Hauptgeschäftsstelle Köln

Europäische Kommission
Generaldirektion Justiz und Inneres
Referat A3 – Justizielle Zusammenarbeit
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Opinion of GRUR on the International Civil Law preliminary draft concerning non-contractual obligations

Dear Sirs,

The German Association for Intellectual Property and Copyright Law (*Deutsche Vereinigung für Gewerblichen Rechtsschutz und Urheberrecht e.V.*) is a nonprofit academic association of practicing professionals and scholars in the area of intellectual property and copyright law as well as competition law. The purpose of this organization according to its charter is to provide academic continual education in the area of intellectual property law and to aid law-making bodies as well as competent ministries and institutions in the area of intellectual property rights.

1. GRUR welcomes the unification of international civil law with respect to non-contractual obligations and, included therein, the particular element of that rule which is subsumed under article 6 concerning Unfair competition and unfair trade and marketing practice, as that article should ultimately be entitled. Furthermore, GRUR welcomes the legal form of a regulation.
2. GRUR considers article 6 as a continuation of *Place of conflict of interests in competition* which dominates German legal practice according to consistent practice of the German Federal Court of Justice supported by legal literature. GRUR wishes to

adhere to this practice. In the grounds for deliberation it should be taken into account that whenever market-oriented competitive activities are concerned the site of conflict of interests in competition is the *market place*. Single obstructive acts against individual competitors are not included.

3. With respect to advertising and marketing measures directed at consumers and the trade German legal practice defines as ‘market place’ the area where the product or service in question is being advertised. The sales outlet where, subsequent to marketing and advertising measures, the contract is ultimately concluded or fulfilled is, by contrast, irrelevant.
4. Under the ruling of the German Federal Court of Justice preparatory competitive activities (e.g. sending a circular letter) which originate in Germany but concern competition directed at customers in a foreign market are judged by the law of the foreign market place. The German Law against Unfair Competition is to be disregarded in such cases. There are however certain circumstances where this procedure yields unsatisfactory results. Thus if the preparatory activities concerned are fraudulent German national law should – in view of the heightened wrongfulness – also be applicable without prior recourse to the legal bases of the legal system of another member state. Such was the case which resulted in the *Lottery abroad* (‘Gewinnspiel im Ausland’) ruling of the German Federal Court of Justice (BGH, Neue juristische Wochenschrift, 1998, p. 1227). The German Federal Court of Justice has taken this particularity insufficiently into consideration.
5. Based on German experience, GRUR sees a need for regulatory action which should, at least in the grounds for deliberation, comment on the issue of multi-state-competition, particularly on multi-state-advertising in the print-media and radio. The guideline for television departs is based on the principle of the broadcasting country. This principle is favourable to the broadcasting companies as it subjects various television broadcasting companies in a coordinated area to a single legal system. A similar regulation is called for in the area of radio broadcasting and the print-media in order protect the broadcasting companies and publishers with respect to *indivisible* competitive activities. This is particularly important with a view to applications for an injunction where the publisher of commercial communication (newspaper, magazine, broadcasting station) is responsible or, rather, is being held responsible for an unfair

advertisement or advertising spot of an advertising company. Without explicit regulation an advertising action (advertisement) which - due to the trans-frontier distribution of print-media or the technical range of a broadcasting station - is being notably published in several states, is simultaneously and parallelly subject to several legal systems. As far as the advertising companies themselves are concerned this is acceptable even though it unfavourably affects domestic trade.

6. The application of *Place of conflict of interests in competition* fails, whenever recourse to the jurisdiction of another member state reveals a lack of corresponding rules. This is the case if the state to whose legal system recourse is being had lacks state rules and competition is instead regulated by self-monitoring institutions relying on autonomous codices. In this case subsidiary recourse to the *lex fori* should be permitted.
7. In Germany the competence of German-based associations to take legal action under §13 art. 2 Nr. 2 and 3 of the Law against Unfair Competition has proved uncertain in those cases where the association wishes to sue a German-based company for an injunction for competitive actions on a market in another state under that state's law on competition. These problems are not solved by the guideline concerning applications for injunction. The exclusion of procedural issues – with the exception of art. 17 – should therefore be reconsidered.
8. Furthermore GRUR sees a need for clarification concerning the territorial range of a court title of injunction in those cases where unfair competition has occurred in several states but is subject to an application for injunction only in the territory of one of these states.

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