

High Court of Frankfurt on Keyword Advertising - “Interflora” in reverse

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Facts

The plaintiff provides orthodontal treatment under his trade name Polzar. The defendant runs a network of orthodontists which assists them in marketing their services.

The defendant had placed an Adwords ad on Google for the network and used the plaintiff’s trade name “Polzar” as a keyword. The ad itself did not mention the name “Polzar”, neither did the ad refer to the plaintiff in any other way. The ad contained the name and URL of the network and the brand of orthodontic appliances that all of the network’s members offered (“Invisalign”). What the ad also said was that the orthodontic services advertised were only available from members of the network.

The plaintiff asserted a violation of the rights to his trade name and applied for a preliminary injunction. The Regional Court of Frankfurt denied the application. It found that the ad had not affected the trade name’s function of origin.

On appeal, the High Court of Frankfurt granted the injunction.

Judgement

The premise of the High Court's reasoning are the keyword cases decided by the Federal Supreme Court (BGH), which in turn are based on the ECJ's judgements on keyword advertising with the "Interflora" case among them. The BGH's leading cases are "Fleurop", "MOST-Pralinen" and "Bananabay"; as luck would have it, "Fleurop" is a flower delivery service much like "Interflora". Defendants in keyword cases have typically used identical marks as keywords to advertise goods identical to the protected ones. So the key question is whether that use affects the function of origin of plaintiffs' marks. According to the BGH, the function of origin of a mark or trade name is regularly not affected if it is used as a keyword under the following conditions:

- The ad appears in an advertising area which is expressly designated as such (e.g. "Ad" or "Advertisement") and is clearly separate from the search results.
- The ad itself does not contain the mark or the name and does not refer to the owner or to its goods or services in any other way.

If these conditions are met, the user who has typed in the mark or the name, does not assume that the ad comes from the trademark owner or from companies linked to the owner. And if there is no such assumption, the ad does not need to say that the advertiser is not linked to the trademark owner.

Although these conditions are met in the present case, the plaintiff's application is still well-founded, says the High Court. As the defendant operates a network of orthodontists, the public is likely to assume that the plaintiff is part of that network. So the defendant should have clarified that there was no economic link between defendant and plaintiff. Whether the public was aware of the defendant's network before having seen the ad is irrelevant, because the public learns about the network from the ad itself. The High Court refers to the "Interflora" judgement. Therein, the ECJ held that the function of origin is already adversely affected if the ad triggered by a keyword is so vague regarding the origin of goods or services that the internet user is unable to determine from the ad whether an economic link between the advertiser and the trademark owner exists or not (Interflora, para. 45). The ECJ also held that, if the trademark owner maintains a distribution network like "Interflora" which consists of numerous retailers, it may be particularly difficult for the user to tell whether the advertiser belongs to that network.

According to the High Court of Frankfurt these principles apply in the present case, although it represents the reverse situation to “Interflora” and “Fleurop”: While the plaintiffs in the “Interflora” and “Fleurop” cases went against the false impression that the defendants were members of their networks, here the plaintiff goes against the false impression that he is a member of the defendant’s network. Either way, the High Court states, the public may assume economic links between plaintiff and defendant where there aren’t any. It does not help that the ad displays the defendant’s name and URL. If the public assumes economic links between separate companies, it will expect these companies to act under different names and to maintain separate online presences.

Conclusion and outlook

The “Interflora” doctrine potentially applies in any case where, in the eyes of the public, the parties may cooperate on the basis of contract or corporate affiliation. The public is prone to misconceptions of that kind. More generally, it is a questionable notion that the general public is able to tell search results and sponsored results apart. Surveys suggest that large parts of the general public are not aware of that distinction in the first place. Search engine operators like Google rather support this confusion by aligning the look of search results and sponsored results more and more.