

“No Internet infringement”

The Higher Regional Court of Frankfurt/Main recently decided that registration of the domain name “*drogerie.de*” (*drogerie* is the German term for drugstore) by a company intending to issue an Internet guide collecting and publishing information about the drugstore business does not infringe the intellectual property rights of the *Verband Deutscher Drogisten e.V.* (Association of German Pharmacists). The Court held that an Internet user would not believe that the information available under “*drogerie.de*” had been provided by a pharmacist.

The claimant, representing a large majority of German pharmacists, argued that the defendant obstructed both the Association and its members by using the domain name “*drogerie.de*”. It also argued that the domain name was confusingly similar to the journal title “*Drogerie & Parfümerie*” (“Drugstore & Perfumery”) published by the Association.

The Court ruled that there was no trade mark infringement as there was no danger of confusion between the domain name and the title of the Association’s journal. It also rejected a claim for forbearance under section 1 of the German Unfair Competition Act (UWG) (obstruction of competition contrary to public policy). The Court said that any competitive act obstructs a competitor’s scope of action but it would only be illegal if the

competitor’s development on the Internet was obstructed with the specific aim of pushing it out. This kind of obstruction had not taken place, particularly since the Association was already using the name “*Drogistenverband.de*” on the Internet.

The Higher Regional Court also rejected a claim for forbearance under sections 826, 226, 1004 of the German Civil Code (BGB) (deliberate damage contrary to public policy). Under unfair competition law, it is not illegal to register domain names solely for the purpose of selling them for profit. The Association’s interest in preventing people who are not specialists from using the term “*drogerie*” was not relevant to the current dispute regarding the domain name. If the Association wanted to stop such a situation arising, then it would have to proceed against the contents of such websites under the German Civil law.

The decisive question was whether there was a danger of misleading the public through the defendant’s presence on the Internet under sections 3, 13 paras. 2, No. 2 of the German Unfair Competition Act (UWG). The Lower Regional Court of first instance had confirmed the existence of this danger but the Upper Regional Court held that the reasonable and informed Internet user, seeing the address “*drogerie.de*”, would not expect the contents of the website to have been created by, or even controlled by, a

pharmacist. Even if he hoped to find, through the domain, a general Internet portal with presentations in the pharmaceutical field, he would not expect to find a pharmacist through the Internet domain. Just as in a normal chemist’s shop, a consumer would not necessarily expect to find a qualified pharmacist, particularly as the number of branches and self-service chemist’s shops is increasing. The Upper Regional Court accepted the defendant’s argument that its editing of the site was comparable to the activities of a publishing company which would not be expected by consumers to have specific knowledge about the material it published.

The Court held that the term *drogerie* was not legally protected as the name of a profession, in contrast to *drogist* (pharmacist).

The Higher Regional Court invited the Association to appeal to the Federal High Court of Justice (BGH) because of the importance of the principle, possibly also because of recent differing rulings in the field of generic domain names. In particular, “*rechtsanwalt.com*” (attorney-at-law.com) was held to be confusing by the Higher Regional Court of Hamburg.

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