

QUESTION 77

Misleading and unfair advertising (Television without frontiers)

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Q77

Statements by AIPPI Television without Frontiers

Green Paper on the Establishment of the Common Market for Broadcasting, especially by Satellite and Cable

The Commission of the European Communities has given the Association Internationale pour la Protection de la Propriété Industrielle (AIPPI) the opportunity of submitting comments on the "Green paper on the Establishment of the Common Market for Broadcasting, especially by Satellite and Cable". At its congress on December 8, 1984, the Council of AIPPI dealt with the Green paper and requested the Committee "Deceptive and Unfair Publicity" to elaborate their comments. The president of this committee attended the hearing by the EEC Commission on December 12 and 13, 1984.

According to its statutes, one of AIPPI's intentions is to further the realization of the necessity of international protection of industrial property in the broadest sense and to suppress unfair competition. It has always been a particular concern of AIPPI to support the harmonization of various types of national regulations.

AIPPI will hereinafter only comment on the questions brought up in the Green paper which touch on its statutory tasks, i.e. in particular on the questions of harmonization of the Unfair Competition Law and the Copyright Law, regarding Copyright Law moreover only on a few fundamental aspects. The Association Littéraire et Artistique Internationale (ALAI) will comment in detail on the individual questions regarding copyright. We shall, however, not deal with questions specifically relating to broadcasting.

I. Lack of harmonization of the right of unfair competition

AIPPI regrets that apart from the guideline of the Council of Ministers regarding the harmonization of the legislative and administrative regulations against deceptive publicity dated September 10, 1984, there is so far still a lack of harmonization of the Unfair Competition Law in the European Community and also the Green paper for the Common

Market for Broadcasting does not provide any harmonization of the general Competition Law, in particular of the law to combat unfair competition (Green paper, p. 210, 211). In a field which is economically and culturally very important, the establishment of a Common Market is aimed at without relevant regulations which can protect companies and individuals sufficiently from improper acts or similar legal offences. As already was the case in other fields, in this case, too, the economical and technical development will precede by far the establishment of uniform Community Law regulations which does not necessarily have to be so. Even if the view taken by the Commission that the general advertising law can only be dealt with as part of a general and comprehensive harmonization drive (Green paper p. 211), the lack of harmonization will not only have an effect on isolated, individual cases, but, in view of the technical development, on the field of television communication on a broad level.

As for the rest, the group can consent to the view expressed in the Green paper (p. 211) that general and specific law on advertising and competition for all advertising media should, as a matter of principle, be treated on equal terms. However, not only advertising regulations specifically relating to broadcasting but also the remaining Law on Advertising require urgent harmonization. Only then can a really free trans-frontier broadcast and television advertising and an effective protection for consumers and competitors from unreasonable acts be guaranteed.

It will thus be practically impossible for broadcasting companies to observe competition laws in all member States which may receive the programs by satellites or cable, and the harmonization should be pushed forward in order to secure the free flow of information between the EEC States.

The Commission justifiably points out (Green paper p. 260/261) that a harmonization which would restrict itself to a reference to the law of the broadcasting State, would not be in conformity with the Debaue decision of the European Court. Such a solution would result in distortions of competition between national and foreign broadcast advertising and in certain fields to a discrimination against national broadcast advertising vis-à-vis such advertising from another member State. AIPPI therefore suggests to the Commission that it should examine whether the work for harmonization of the law to combat unfair competition should not be resumed forthwith. While AIPPI regards the guideline on the restraint of deceptive advertising as very useful, it is, however, insufficient for the remaining field of unfair competition in view of the varying national regulations. A harmonization of law in the field of the Law against Unfair Competition is inevitable since this alone enables the companies to plan and proceed with the marketing of their services and products and the advertisement for same in the Common Market according to uniform competition law regulations. A Common Market should entail uniform conditions of competition and consequently also uniform regulations for the suppression of unfair competition. In this connection, we refer to the comments of AIPPI dated July 14, 1969 on the unification of the Unfair Competition Law in the member States of the Common Market Community. The basis of these comments was the unanimous view taken by the managing committee of AIPPI that a harmonization of the Unfair Competition Law of the countries pertaining to the European Community is to be aimed at. Our Association continues to regard this view as correct. The need for harmonization of the general advertising law, especially the law for suppression of unfair competition, in particular applies to the Common Market for radio and television, since advertising spots in radio and television have a particularly strong influence on the addressees of the advertisement and, as we know from experience, unfair competition, when carried out in this media, has a particularly lasting effect.

In general, AIPPI shares the Commission's view that it does not appear to be advisable to unify, in the expected guideline proposal for the Common Market for Broadcasting, the Unfair Competition Law only for this particular section. Nevertheless, it remains to be examined whether the establishment of a Common Market for Broadcasting and Television should not be taken as grounds for harmonizing the Unfair Competition Law in respect of the most important points. It is a fact that also in connection with radio and television broadcasting and the work of the television and radio organizations, acts of unfair competition play an important role. This applies to both the commercials transmitted by the radio and television organizations and the competition of the radio and television organizations between each other. In the guideline, a regulation should in any event be provided for the factual situations mentioned under II. B.

AIPPI cannot share the Commission's view that the harmonization guideline can confine itself to certain fundamental rules of the law of radio advertising and that the details should be left to the member States (Green paper, p. 262). Besides the EEC guideline there is neither scope for a more stringent nor more liberal national law if discrimination against national or foreign advertising companies and broadcasting corporations is to be prevented. However, such a discrimination can also result from the details of certain regulations.

II. Consequences of the lack of harmonization of the Unfair Competition Law

Even now advertisements in newspapers and magazines as well as advertisements on radio and television have an effect beyond the borders and reach the reader and viewer in the neighbour States. The effects of this "overspill" are still relatively insignificant. However, by the establishment of the Common Market for Broadcasting, they will probably increase considerably. New technologies, such as broadcasting by satellite, with which listeners and viewers in numerous countries can be reached without the intervention of a terrestrial intermediary and, furthermore, cable television and the increased admission of private television and radio organizations in various countries (as for example in the Federal Republic of Germany), will result in advertising spots crossing frontiers to a far greater extent. In view of the varying legal positions they will perhaps even deliberately be broadcast from one member State to another. The inevitable consequence is that the varying legal regulations on unfair competition in the different member States will become apparent to a larger extent than was so far the case. If a company which is located in Germany and advertises there is subject to more stringent competition law provisions than for example a company which is located in the United Kingdom, advertising spots which are broadcast from the United Kingdom to the Federal Republic of Germany or are transmitted there, will be subject to less stringent regulations.

The inevitable consequence is a discrimination against the companies in the receiving country Germany, namely both against the competitors of the advertising companies and of the national broadcasting organizers.

As a result of the almost complete lack of harmonization in the field of the law for the suppression of unfair competition, the companies and persons concerned will also in the future, based on national law, refuse to accept practices of unfair competition in connection with the transmission of broadcasting and television programmes. According to the ruling of the European Community Court of Justice in the Coditel and Debaube cases, the member States can prohibit the broadcasting of such "foreign" advertisement which is in contradiction with more stringent internal regulations. The application of the law of the receiving State will, without harmonization, in many cases make impossible the transmission of a radio or television broadcast from another member State. Internal cable network operators would have to refrain from broadcasting certain advertising spots, which could also result in technical problems. Foreign advertisers and radio corporations,

and also national radio and television corporations which because of advertising spots are sued for abstention before the national courts, will claim that the national laws represent a restriction of the exchange of information between the member States (Articles 30, 36 of the EEC Treaty) and will appeal to the European Community Court of Justice. The result will, as in the fields of patents, trademarks and copyright, be a harmonization of law in individual cases by the practice of the European Community Court of Justice, which again will lead to legal uncertainty for all parties concerned over a long period of time. This situation is extremely unpleasant, considering that unfair competition cases often are connected with grave infringement of rights and interests of the companies and persons concerned. It will, in the end, also harm the prestige of the judicial system and the European idea.

As already expressed in our comments of June 14, 1969, there is a need for the following regulations regarding the factual contents of the harmonization of law in the field of Competition Law in the countries of the European Community, to which we would like to draw the attention of the Commission:

A.

1. general Clause;

2. individual facts;

a) protection of trade names, business names and well-known marks including titles of newspapers, magazines as well as radio and television programmes;

b) slavish imitations;

c) disparagement and comparative advertising;

d) protection of trade and business secrets;

e) enticement of employees;

f) extras, discounts and particular trade fairs;

3. protection of geographic indications and marks of origin;

4. uniform legal remedies and procedures.

Moreover, there is an urgent need for the regulation of the following points regarding the field of press, broadcasting and television:

B.

1. necessity to clearly separate advertising and other (editorial) programmes;

2. obligation to identify broadcasts and advertisements which are paid for as publicity;

3. obligation to identify PR broadcasts and advertisements as publicity;

4. obligation to identify sponsored broadcasts in which products of the sponsor are shown, recommended, etc., as publicity;

5. a regulation on when editorial references to companies, products and services in broadcasts and newspaper articles are inadmissible (Green paper p. 280, last paragraph);
6. prohibition of camouflaged advertisement;
7. a regulation of the right of reply, since herewith the consequences of incorrect reporting on products, services and companies can be counteracted.

Moreover, according to the statements of our members, a number of regulations in the individual member States which refer to advertisement and which are not indicated in the Green paper, still exist. Therefore, they would either have to be revoked or also harmonized. Hereinafter follows an example:

In Italy, for instance, pursuant to the "sanitary Law" No. 1265 of 1934, no advertisements for drugs or medical products can be published or broadcast without the Ministry of Health's previous authorization. A similar pre-clearance system also exists, in Italy, as far as the advertising for several other products, such a tooth-pastes, sweeteners, insecticides, disinfectants, detergents, mineral waters, etc., is concerned. Those who infringe such law are punished on criminal grounds. It is evident that the broadcasting of TV commercials for such products from a country where the same rule does not exist, would give rise not only to a discrimination of the Italian companies, but also to serious problems of penal law. Many similar examples could be quoted.

III. Regarding questions of copyright

ALAI will comment in detail on the various questions of copyright. AIPPI wishes to confine itself to some fundamental observations:

Authors and other artists in many cases have had to struggle for their rights in disputes lasting for decades. In negotiations with large organizations such as television and broadcasting corporations, the individual artist usually is in a weaker position. The exercise and enforcement of rights is always made more difficult for an individual person, perhaps with the exception of great artists and stars. The Commission should therefore pay particular attention to the safeguarding and protection of the rights of authors and other artists. For the reasons outlined above, reservations exist against a legal licence. It implies a disproportionate encroachment upon the author's rights and the principle of private autonomy. According to experience, no adequate royalties can be agreed upon, if the negotiations regarding the amount of the fees only take place after utilization. The Commission should at least examine very carefully, whether the best way of protecting the author's rights would not be in having them safeguarded by exploitation companies, the establishment of which should be provided in the guideline.

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