FEDERAL COURT OF JUSTICE

IN THE NAME OF THE PEOPLE

VERDICT

I ZR 208/12

Announced on:
12. September 2013
Bürk
Official Inspector
as a notary
the office

in the litigation

Reference work: and
BGHZ: no
BGHR: and

Referral email

BGB § 823 para. 1 Ai, § 1004 para. 1 sentence 2; UWG § 7 para. 2 no. 3

If a company creates the possibility on its website for users to send an unsolicited recommendation email to third parties, which refers to the company's website, this is to be judged no differently than an unsolicited advertising email sent by the company itself. If the recommendation email sent without the consent of the addressee is addressed to a lawyer, this represents an unlawful interference with the established and operated business operation.

BGH, judgment of 12 September 2013 - I ZR 208/12 - LG Cologne

Cologne District Court

The First Civil Senate of the Federal Court of Justice has in written proceedings, in which could be submitted until 1 August 2013, by
the presiding judge Prof. Dr. Dr. hc Bornkamm and the judges Pokrant,
Prof. Dr. Büscher, Dr. Koch and Dr. Löffler

found to be right:

On appeal by the plaintiff, the judgment of the 11th Civil Chamber of the Cologne Regional Court of 23 October 2012, rejecting resolution of the further appeal in terms of costs and in- repealed to the extent that the application for injunctive relief disadvantage of the plaintiff has been recognized.

To the extent of the annulment, the judgment of the Cologne District Court of 14 February 2012 amended on the appeal of the plaintiff:

The defendant is ordered to refrain from
Plaintiff to establish initial contact via
to contact us by e-mail without his express
consent has been obtained.

The defendant shall be liable for each case of infringement of the In the event of a breach of the obligation to refrain from doing so, a fine of up to 250,000 € and in case this cannot be recovered may impose administrative detention or administrative detention of up to six months. threatened, whereby the administrative detention was imposed on the managing directors of the complainants are to be carried out.

The costs of the legal action shall be borne by the defendant.

By law

Facts:

1 The plaintiff, a lawyer, takes the case in the field of foreign
The defendant, who is active in the activity, is primarily seeking injunctive relief.

2 On the defendant's website there is a so-called Wei-
recommendation function. If a third party provides his or her own email address and a
further email address, will be forwarded from the defendant's website to the further
another email address specified by the third party an automatically generated
E-mail sent referring to the defendant's website.
The recipient of the email receives the reference to the defendant's website as
sent by this email. A recommendation email does not contain any other content.

3 From 26 December 2010, the plaintiff received without his consent
several recommendation emails. After a warning and another
complaint of the plaintiff, the defendant agreed to provide his specific email
Address for receiving the recommendation emails. In the following period
The plaintiff nevertheless received emails referring to the website of the
He also received eight more emails from the company.
complained about emails that were labeled "test emails."

4 The plaintiff appeals - as far as still relevant for the appeal -
against the sending of emails without his consent. He has requested
to prohibit the defendant from doing so under threat of legal sanctions
ten,

to contact him by email for the first time without his express consent.

5 In addition, he has ordered the defendant to pay warning costs and Interest on the court costs advance paid by him taken.

6 The defendant has opposed the plaintiff's request and has In particular, the e-mails sent to the plaintiff were does not contain any advertising. She, the defendant, is not to be regarded as a disturber, because the emails were sent by third parties. The plaintiff had to accept the disputed contacts, as he has an e-mail post Without an unreasonable abandonment of her recommendation function, tion could send emails to email addresses unknown to it of the plaintiff could not be prevented.

7 The district court dismissed the action. The appeal against The plaintiff's appeal was unsuccessful. With his appeal granted by the Court of Appeal, appeal, which the defendant requests to be dismissed, the Plaintiff continued his pending action.

Reasons for the decision:

8 I. The Court of Appeal has upheld the plaintiff's claim for injunctive relief due to interference with the established and operated business pursuant to Section 823 Para. 1, Section 1004 Para. 1 of the German Civil Code (BGB). It stated:

9 The injunction cannot be based on the December 2010 and January 2011, because the defendant has I switched to the email forwarding function in February 2011. After that The plaintiff did not respond to the request until he received further emails in September 2011. No response has been made, so that the emails are to be considered as "used" until January 2011.

Because of the recommendation emails sent from September 2011
There is also no claim for injunctive relief. The defendant directs its
function to a narrow potential user group consisting of third parties
which draws other people's attention to the defendant's website
The defendant's recommendation function is only
Used 200 times per year. The recommendation cannot be used by automatic
programs (after changing the function accordingly)
and the defendant now prohibits the sending of emails to e-mail addresses that it
previously included in a "blacklist".

10 The provision of the recommendation function cannot therefore be considered as a competitive
anti-competitive conduct. The defendant does not intend
and do not accept that abusive behaviour may lead to
third parties to distribute the recommendation emails. The defendant
have done everything possible beyond abolishing the function to influence
to avoid any negative impact on third parties, especially since they do not provide any incentives to use the
function I have created.

11 Finally, the defendant cannot be considered as a disturber with regard to the
unsolicited sending of recommendation emails.

12 II. The appeals are successful insofar as they are directed against the
to the extent that they lead to the
Set aside the appeal judgment and convict the defendant according to the
Contrary to the opinion of the Court of Appeal,
the plaintiff's claim for injunctive relief under Section 823 para. 1,
§ 1004 para. 1 sentence 2 BGB due to an unlawful interference with his
directed and carried out commercial operations. The additional data collected

Claims for payment of warning costs and interest on the amount advanced
Advance payment of legal costs, however, is unfounded.

13 1. The application for an injunction is sufficiently
determined in accordance with Section 253 Paragraph 2 No. 2 of the Code of Civil Procedure. The Court of Appeal has
The injunction application is not explained in more detail. However, this is harmless.
A motion to sue is a procedural statement that the court
can interpret independently (BGH, judgment of 29 June 2000 -
I ZR 128/98, GRUR 2001, 80 = WRP 2000, 1394 - ad-hoc announcement; judgment of
3. April 2008 - I ZR 49/05, GRUR 2008, 1002 Rn. 16 = WRP 2008, 1434 -
Schuhpark; judgment of 22 July 2010 - I ZR 139/08, GRUR 2011, 152 paras. 23 to
25 = WRP 2011, 223 - Children's high chairs on the Internet).

14 With the injunction application, the plaintiff seeks a general contact
ban on recording by email for the defendant. Such a far-reaching claim
The plaintiff can only contact the defendant by
E-mail can be banned if it constitutes an unlawful intrusion into his
established and operated business. The generally understood
The injunction application also contains the concrete infringement
form. From the plaintiff's arguments in the statement of claim, which lead to the interpretation
of the application for a ban (see BGH, judgment of 4 October 2007 -
I ZR 143/04, GRUR 2008, 84 Rn. 19 = WRP 2008, 98 - shipping costs; BGH,
GRUR 2008, 1002 Rn. 17 - Schuhpark), it follows with the necessary clarity
possibility that the plaintiff only wants to prohibit the defendant from sending him
explicit consent to send recommendation emails.

15 2. The plaintiff has a claim against the defendant under Section 823 para. 1, Section 1004 para. 1
Sentence 2 BGB a claim to refrain from sending e-mails with
advertising content. Sending the recommendation emails by the

The action brought against the court constitutes an unlawful interference with the established and exercised
The plaintiff's business because unsolicited email advertising
is business-related and affects the operational processes in the recipient's company.
gers. Sending emails containing unsolicited advertising that
the recipient must view each one individually and where an objection
is necessary to prevent further sending, leads to a non
insignificant harassment (cf. BGH, decision of 20 May 2009 -
I ZR 218/07, GRUR 2009, 980 Rn. 10 ff. = WRP 2009, 1246 - E-Mail-Wer-
Exercise II).

16 a) The sending of the recommendation emails to the plaintiff is
This is unsolicited advertising.

17 aa) The term advertising includes, according to common usage,
all measures of a company aimed at promoting the
sale of its products or services. This means that in addition to the
direct product-related advertising and indirect sales promotion -
for example in the form of image advertising or sponsorship. In accordance with
Article 2(a) of Directive 2006/113/EC on misleading and comparative advertising,
advertising is therefore any statement in
the exercise of a trade, business, craft or liberal profession with
the aim of promoting the sale of goods or the provision of services
promote (BGH, GRUR 2009, 980 Rn. 13 - E-Mail-Werbung II).

18 bb) This broad understanding of the term advertising does not
the necessary distinction between commercial transactions and advertising
ation (aA Haug, K&R 2010, 767, 769). The concept of commercial
Act is - as is the term contained in Directive 2005/29/EC
of business practices - insofar as it is broader than the concept of advertising,

also conduct related to the conclusion or implementation
execution of contracts or the sale and delivery of a product
(see Section 2 Paragraph 1 No. 1 UWG). The distinction made by the law
There is therefore no distinction between “commercial practice” and “advertising”.
assumption that indirect sales promotion is also a
advertising.

19 cc) Contrary to the defendant’s view, classification as
Advertising does not require that the sending of recommendation emails ultimately
based on the will of a third party (aA OLG Nürnberg, GRUR-RR 2006,
26) What is decisive is the sole aim that the defendant has in
ation of the recommendation function. Since such a function
experience has the purpose of alerting third parties to the defendant and the
services offered, the information provided in this way contains
sent referral emails are advertising.

20 b) The interference with the established and exercised business operations of the
The plaintiff's claim is also unlawful. The necessary balancing of the opposing
The disputed interests of the parties are to the detriment of the defendant. According to § 7
Paragraph 2 No. 3 UWG provides - from the exception not relevant here -

Except as per Section 7, Paragraph 3 of the German Unfair Competition Act (UWG), any advertising using electronic

tronic mail without the prior express consent of the recipient.
unreasonable harassment. This legislative assessment is
judgment of the general clauses of the Civil Code also
to avoid contradictions in evaluation (cf. Köhler in Köhler/
Bornkamm, UWG, 31st edition, § 7 marginal no. 14; Koch in Ullmann, jurisPK-UWG,
3rd edition, § 7 marginal note 153). Due to the unreasonably annoying nature of
such advertising towards the recipient, the sending of an advertising

E-mail without prior express consent is generally illegal
(cf. BGH, GRUR 2009, 980 para. 14 - E-Mail-Werbung II).

21 In the case in dispute, a different assessment does not arise from the fact that
that the advertising will only be sent to persons who have been consented to by a third party by entering
from their email address. Unfair competition is a
which constitutes an unlawful interference with the established and exercised
constitutes a commercial enterprise if it causes market participants to be placed in an unreasonable
harassment (Section 7, Paragraph 1 of the Unfair Competition Act). Such a level of harassment is usually
moderately if there is a risk that the advertiser will use
which are also prohibited for professional advertisers (see BGH, judgment of
6 July 2006 - I ZR 145/03, GRUR 2006, 949 Rn. 20 = WRP 2006, 1370 - Only-
the advertised customers). This is to be assumed here. The decisive factor is that the
Recipient has not consented to this type of advertising and practically does not
can defend themselves (Köhler in Köhler/Bornkamm aaO § 7 Rn. 201).

22 Contrary to the defendant's opinion, the harassment of the plaintiff
by unsolicited e-mails also not insignificant within the meaning of § 3
UWG, which excludes the illegality of the interference with the established
established and practiced business. By determining in
Section 7 para. 2 UWG, according to which the example cases listed in this provision
"always" constitute an unreasonable nuisance, it is made clear that the Ba-
gatell clause of Section 3 UWG is no longer applicable (cf. BGH, judgment of
11 March 2010 - I ZR 27/08, GRUR 2010, 939 Rn. 18 = WRP 2010, 1249 - Tele-
Telephone advertising after a change of company; judgment of 5 October 2010 -
I ZR 46/09, GRUR 2011, 433 Rn. 23 = WRP 2011, 576 - Application for prohibition at Te-
In addition, it should be taken into account that the frequent transmission of advertising emails
without the recipient's prior consent by various senders is to be expected whenever the
transmission

individual emails is permissible (cf. BGH, GRUR 2009, 980 Rn. 12 - E-Mail-Advertising II).

23 c) The defendant is liable for sending the recommendation emails as perpetrator. It is irrelevant that the sending of the recommendation E-mails ultimately result from the plaintiff's e-mail address being entered by a Third parties (cf. BGH, GRUR 2006, 949 Rn. 20 - Customers advertise customers It is important that the recommendation emails are sent to the de recommendation function provided for this purpose by the Defendant and the defendant has received a recommendation from the recipient E-mail appears as the sender. The purpose of the forwarding function of the Defendants also consist in the fact that third parties (with the involvement of known other persons) a reference to the defendant's website This assessment is not contradicted by the fact that the defendant does not accept abuse of the recommendation function. It is obvious, that the forwarding function is used to send recommendations to third parties. to send promotional emails without any certainty as to whether they have agreed to this.

24 d) According to the findings of the Court of Appeal, the recommendations e-mails were sent to the plaintiff without his consent. A counter-complaint to the effect that the Court of Appeal had made a corresponding Statement by the defendant, who has the burden of explanation and proof in this regard (see Ohly in Piper/Ohly/Sosnitza, UWG, 5th ed., § 7 Rn. 52), the revision No reply was filed.

25 e) The risk of repetition required for the injunction is indicated by the established unlawful conduct of the defendant. This corresponds to the constant claim for injunctive relief under competition law.

case law (see only BGH, judgment of 26 October 2000 -
I ZR 180/98, GRUR 2001, 453, 455 = WRP 2001, 400 - TCM-Zentrum; judgment
of 2 October 2012 - I ZR 82/11, GRUR 2013, 638 Rn. 58 = WRP 2013, 785 -
Völkl, mwN), but also applies if the injunction asserted
award - as in the case in dispute - arises from general tort law (cf. BGH,
Judgment of 8 February 1994 - VI ZR 286/93, GRUR 1994, 394, 395 = WRP 1994,
306 - Balance sheet analysis; judgment of 27 January 1998 - VI ZR 72/97, NJW 1998,
1391, 1392 - plain text, each time violating the general personality rights
right; judgment of 30 October 1998 - V ZR 64/98, BGHZ 140, 1, 10, on the violation
violation of property; Soehring in Soehring/Hoehne, Press Law, 5th ed., § 30
Rn. 8a; Ricker/Weberling, Handbook of Press Law, 6th ed., Chapter 44 Rn. 5;
MünchKomm.BGB/Baldus, 6th ed., § 1004 Rn. 292).

26 To the extent that the Court of Appeal has accepted that, in relation to the
There is no repetition of the emails sent between December 2010 and January 2011.
risk of failure, so that the design of the recommendation function for the time
point of the first recommendation emails sent to the plaintiff.
cannot be joined. By giving up
of the infringing conduct, the risk of repetition is eliminated in principle.
nally not. Experience shows that the penalties resulting from previous unlawful actions
serious concern that the infringer will continue to act in the same
will therefore generally not end due to the abandonment
the activity in the context of which the infringement occurred (BGH, GRUR 2013,
638 Rn. 58 - Völkl, mwN). The risk of repetition in the case in dispute would only have
by submitting a cease and desist declaration subject to penalty
can be punished because the illegal act committed can no longer be reversed.
can be made common, so that the defendant can only be punished by a
cease and desist declaration could have convincingly demonstrated that it had
will not repeat the relevant action (cf. competition law BGH,

Judgment of 19 March 1998 - I ZR 264/95, GRUR 1998, 1045, 1046 = WRP 1998, 739 - condensing boiler; Bornkamm in Köhler/Bornkamm aaO § 8 Rn. 1.34; Teplitzky, Competition Law Claims and Procedures, 10th edition, Chapter 10 Rn. 21 mwN; cf. on the tort law claim for injunctive relief BGH, GRUR 1994, 394, 395 - Bilanzanalyse; Ricker/Weberling aaO Kap. 44 Rn. 6, 11; Soehring in Soehring/Hoehne aaO § 30 Rn. 11).

27 3. The plaintiff has a claim for reimbursement of warning costs The Court of Appeal, however, rightly denied this.

28 a) As in competition law, the injured party who has his company claim for leave to remain based on Section 823 Paragraph 1, Section 1004 Paragraph 1 Sentence 2 of the German Civil Code, In addition, you are entitled to reimbursement of the costs of the warning if the warning was justified (cf. BGH, judgment of 26 May 2009 - VI ZR 174/08, GRUR-RR 2010, 269 Rn. 20 - War of the Roses; judgment of 19 October 2010 - VI ZR 237/09, GRUR 2011, 268 Rn. 11 mwN). If the injured party is notified of the If the infringer is represented by a lawyer, the infringer must pay the statutory fees the lawyer's fees under the Lawyers' Remuneration Act, if the appointment of a lawyer to exercise the rights was necessary and appropriate (cf. BGH, GRUR 2011, 268 para. 11; Soehring in Soehring/Hoehne aaO § 30 Rn. 22).

29 b) Expenses for a warning are, from the point of view of The infringer shall only be entitled to compensation for damages if the concrete legal work from the perspective of the injured party taking into account his/her specific situation to ensure appropriate legal prosecution was necessary (BGH, GRUR-RR 2010, 269 Rn. 20; cf. competition law BGH, judgment of 6 May 2004 - I ZR 2/03, GRUR 2004, 789 = WRP 2004, 908 - self-commissioning, mwN).

30 The appointment of a lawyer to issue a warning for a violation against a tort law offense is not necessary if the The person issuing the warning has sufficient expertise to carry out the appropriate appropriate legal action for an easily recognizable violation (cf. BGH, GRUR 2004, 789, 790 - self-appointment). A lawyer must, in the case of his own involvement, demonstrate his expertise in issuing the warning of a tortious act under the aspect of damage prevention ation (§ 254 para. 1 BGB). The involvement of another legal lawyer is not necessary for typical, easily prosecuted violations of law. There is then no entitlement to reimbursement of the costs incurred Costs. The same applies in the case of self-commissioning (cf. BGH, GRUR 2004, 789, 790 - self-commissioning).

31 4. The appeal also unsuccessfully challenges the dismissal of the Entitlement to interest on the advance payment for legal costs. It can remain open whether, in addition to the interest claim pursuant to Section 104 Paragraph 1 Sentence 2 ZPO a further substantive legal claim to interest on the court costs incurred for the period from their payment until receipt of the application for cost assessment under Section 286 of the German Civil Code. In the present case In any case, there is no convincing justification for such an saying.

32 III. The contested judgment is therefore set aside on the plaintiff's appeal. to the extent that the Court of Appeal has ruled on the injunction application to the detriment of the plaintiff. The extent of the annulment is the first to amend the judgment of the court of first instance on the plaintiff's appeal and to convict the defendant in accordance with the injunction application. In all other respects, the appeal is to reject.

33 The decision on costs is based on Section 92 Paragraph 2 No. 1 of the Code of Civil Procedure.

Bornkamm Pokrant RiBGH Prof. Dr. Büscher is on vacation and therefore cannot sign.
Bornkamm

Koch Löffler

Lower courts:

AG Cologne, decision of 14.02.2012 - 138 C 576/11 -

LG Cologne, decision of 23.10.2012 - 11 S 122/12 -