INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

General Report for Working Session

"*Claims about claims and disclaimers - welcome to the glamorous world of advertising!*"

Distribution Commission

with support of Technology, Media and IP Commission

AIJA Munich 2016 Congress

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19 April 2016

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1. "Claims about claims and disclaimers – welcome to the glamorous world of advertising!"

The Distribution Commission will present an exiting symposium on advertisement law fit into the tight spot of a three-hour working session which will leave you in awe! Let the best speakers in advertisement law amaze you with a dashing display of in-depth legal knowledge and fun-facts, boosting your skills as you effortlessly sit and relax to enjoy the show!

The focus of the session will both be on the material advertisement law - what is allowed, what isn't, which psychological aspects are in play, how about damages rewarded – as well as on the regulations concerning the advertisement platforms. Curious? Please feel free to let us entertain you!

This General Report sets the stage for what is going to be an entertaining and informative insight in the world of advertisement law.

1.1. Munich 2016

At the Munich AIJA Annual Congress 2016, Advertisement Law will be the theme of a 3 hour working session in which the themes of this general report will be further discovered. The working session will also focus in particular on relatively modern developments in advertising such as branded content, vlogs and adblockers.

2. The legal framework

In the context of this General Report we define advertisement law as the legal framework regulating the advertising practice. This legal framework has an international dimension but varies significantly from country to country.

Advertisement law consists of several main elements:

a. regulations regarding health claims;

b. regulations regarding comparative claims;

c. regulations regarding wrongful claims;

d. general regulation on advertisements' contents;

e. regulations regarding types of audiences;

f. practices and regulations regarding *ad blockers*;

g. sanctions;

h. intellectual property in advertisements;

3. Regulations regarding health, comparative and wrongful claims

3.1. General

The central concept in Advertisement Law is the claim. Claims such as "decent enough" or "fair quality" are not very appealing to potential customers, whereas exaggeration and comaprisons can attract lots of customers but can also bring (legal) risks to the advertiser.

3.2. Regulations regarding health claims

The regulation concerning health claims in advertisement varies from jurisdiction to jurisdiction, albeit that, in general, this is a regulatory minefield endangering any advertiser that uses any health claims.

In Greece, for example, there is no particular provision regarding health claims but rather a larger number of more specific ones, depending on the nature of the advertised products. In general, one of the basic pillars on which advertising is based is the principle of truthfulness in advertising which means that any health claim that may mislead consumers is forbidden.

In Switzerland, Health claims[1] for food advertising have to comply with the Federal Ordinance on Foodstuffs and Utility Articles ("Foodstuffs Ordinance") and with the Federal Ordinance on Labelling and Advertising of Foodstuffs ("Labelling Ordinance"):

a. Pursuant to the Foodstuffs Ordinance, advertising and labeling of foodstuffs may not create the impression that food has any therapeutic effect.[2] However, claims relating to health in a positive sense (e.g. "helps you to stay fit"), or nutritional information are generally permitted.

b. Annex 8 of the Labelling Ordinance contains a list of permissible health claims. Health claims which are not listed in this annex have to be approved by the Federal Food Safety and Veterinary Office.[3] All health claims have to fulfill certain criteria, including that they must be easily comprehensible, have to be based on scientific proof and may not be wrong, ambiguous or misleading.[4] The labels and packaging of food that is advertised with health claims in addition have to contain certain information, e.g., information about the quantity of the food needed to achieve the claimed effect etc.[5]

In general, the regulation concerning health claims in advertisement comes from a two sided approach: on the one hand, the correctness of health claims is strictly monitored. On the other hand, any -even if in itself correct- health claims related to products with an unhealthy reputation such as cigarettes and alcohol, but also

1 According to the Proposal for a Regulation of the European Parliament and of the Council on
2 Art. 10(2)(d) Foodstuffs Ordinance.
3 Art. 29f(2) Labelling Ordinance.
4 Art. 29i Labelling Ordinance.
5 Art. 29h Labelling Ordinance.

candies and snacks, are on the tightest of regulatory leashes.

In Germany, for example, Regulations regarding health claims are very strict in relation to correctness and clarity[6] as a high proportion of consumers trusts in the statements of health claims.[7] In case of advertising with health benefits the company is obliged to point to any adverse effects on health.[8] It is forbidden to trivializing the risks associated with the use/enjoyment of the products, especially in case of advertising of alcohol.[9] Further restrictions have to be taken into account especially in case of advertising with a recommendation of a scientist, commercials with prominent persons or a pictorial representation.[10]

False statements that goods or services are able to cure illnesses, dysfunction, or malformations are unlawful.[11] In addition specific regulations like German Medicine Act and German pharmaceutical-advertising law have to be respected. In general, health claims/medical claims have to be true and beneficial effect must be proved and adverse effects have to be mentioned.[12] Advertising of medicines that require authorization but do not have any authorization is unlawful.[13]

In addition there is a different legal framework depending if the advertisement is targeting expert groups or not.[14] If the advertisement of medicines in terms of sec. 2 *Arzneimittelgesetz* is not targeting expert groups the text *„Zu Risiken und Nebenwirkungen lesen Sie die Packungsbeilage und fragen Sie Ihren Arzt oder Apotheker*" has to be added clearly separated.

3.3. Comparitive advertising

Often, conflicts in advertisment law are related to comparitive advertising. Although it is generally accepted that comparative advertising is to the benefit of consumers, as it allows for direct comparison of competing products, making the market more transparent, and fostering competition which, as a result, leads to lower prices and higher quality, not any form of comparative advertising is permissible. Certain rules are in place, to protect both consumers and competitors alike, the first from being misled, and the latter from unfair behaviors and tarnishment of their names and brands. The general rule is, however, that comparative advertising is permitted and, only under certain circumstances, is it forbidden.

In Greece, any advertising, that defines directly or indirectly or suggests the identity of a specific competitor or his products/services, is by definition comparative[15]. Such

6 Helmut Köhler and Joachim Bornkamm, Gesetz gegen den unlauteren Wettbewerb UWG, 33rd ed, Beck 2015, p. 372.

7 Helmut Köhler and Joachim Bornkamm, Gesetz gegen den unlauteren Wettbewerb UWG, 33rd ed, Beck 2015, p. 371.

8 Helmut Köhler and Joachim Bornkamm, Gesetz gegen den unlauteren Wettbewerb UWG, 33rd ed, Beck 2015, p. 372.

9 Cf. Landgericht Ravensburg "bekömmliches Bier" [25.08.2015], 8 O 45/15 KfH, LMuR 2015, p. 168.

10 Sec. 11 HWG.

11 Sec. 3 para. 3 UWG; Annex to Section 3 para 3 nr. 18 UWG.

12 Sec. 3 HWG; Andreas Spckhoff, "Medizinrecht", 2nd ed, Beck 2014, HWG § 3, Rn 2ff.

13 Sec. 3a HWG.

14 Sec. 11 HWG, sec. 2 HWG.

15 Law 2251/1994 on Consumer Protection article 9 par. 2

advertising is, as far as the comparison is concerned, permitted when the following conditions[16] are met:

a. it is not misleading[17] (i.e. it does not meet the criteria to be labeled as an unfair business-to-consumer commercial practice);

b. it compares goods or services meeting the same needs or intended for the same purpose;

c. it objectively compares one or more material, relevant, verifiable and representative features of those goods and services, which may include price;

d. it does not discredit or denigrate the trademarks, trade names, other distinguishing marks, goods, services, activities, or circumstances of a competitor;

e. for products with designation of origin, it relates in each case to products with the same designation;

f. it does not take unfair advantage of the reputation of a trade mark, trade name or other distinguishing marks of a competitor or of the designation of origin of competing products;

g. it does not present goods or services as imitations or replicas of goods or services bearing a protected trade mark or trade name;

h. it does not create confusion among traders, between the advertiser and a competitor or between the advertiser's trademarks, trade names or other distinguishing marks.

In Switzerland, as a general rule, comparative claims are permissible as long as they are not incorrect, misleading, unduly disparaging or imitative.[18] In addition, only similar goods or services of comparable quality and quantity may be compared.

In Germany, in the past, comparative advertising was generally unlawful[19] with certain exceptions. Against the background of harmonization of the regulations on comparative advertising by Directive 97/55/EC comparative claims are nowadays permissible if certain conditions are met.[20] Comparative claims must not conflict with the provisions of sec. 6 (comparative advertising), 5 (misleading commercial practices) and 5a (Misleading by omission) UWG to be permissible.

A comparison is in particular not allowed if the comparison does not objectively relate to one or more material, relevant, verifiable and representative features of the goods concerned or to the price[21] or it does not relate to goods or services meeting

16 Idem

17 Athens Court of Appeal decision nr. 2928/2004, according to which comparative advertising may be misleading if the misleading elements concern the competing product and not the advertised ones

18 Art. 3(1)(e) UCA.

19 Helmut Köhler and Joachim Bornkamm, Gesetz gegen den unlauteren Wettbewerb UWG, 33rd ed, Beck 2015, p. 1039.

20 Helmut Köhler and Joachim Bornkamm, Gesetz gegen den unlauteren Wettbewerb UWG, 33rd ed, Beck 2015, p. 1039.

21 Sec. 6 para. 2 nr. 2 UWG.

the same needs or intended for the same purpose.[22] According to sec. 6 para. 2 nr. 2 UWG a comparison has to be verifiable in order to check if it is factually justified. In addition any comparative advertisement is forbidden if it leads to a risk of confusion between the advertiser and a competitor or between the goods or services offered or the distinguishing marks used.[23] General competition principles like the general prohibition of disparagement of a competitor[24] or presentation of imitations or replicas have to be considered as well.

Very popular forms of comparative advertisement are the advertisement with a unique position or membership of a leading group. These kinds of advertisement are admissible if the relevant statement is true.[25] There must be a clear lead over the competitors which is additionally confirmed by certain consistency.[26]

3.4. Wrongful claims in advertising

The Dutch company Philips launched a huge marketing campaign for the introduction of a new fryer with the name Airfryer in 2010. Just like Tefal's ActiFry fryer the Airfryer does not dip the fries in hot oil or fat but the machine "fries" the fries by circulating hot air, whilst the fries are covered with a thin layer of oil.

Philips claimed that the Airfryer was capable of delivering "the best tasting fries, without the oil", with an asterisk referring to the small print: "for fresh fries add half a dessertspoon of oil for extra flavour. Frozen fries have already been pre-fried".

Tefal argued before the courts of the UK, France, Spain, Gemrany and The Netherlands that Philips should end their campaign and pay damages to Tefal, as the statements used in Philips' marketing campaign were, in Tefal's view, misleading and wrongful.

In the The Hague Court case the legal battle was decided on a french fry tasting. As the judge could not but agree that the fries prepared without any oil were not worthy of the naming "fries" at all, it was made clear that the claim "the best tasting fries, without the oil" was to be considered an example of wrongful claims in advertising.

Wrongful claims clearly fall under the scope of the provisions against misleading advertising and as a consequence the advertisement shall not be permissible. In Greece, the Consumer Protection Law[27] identifies an act as misleading if it contains false information and is therefore untruthful or in anyway - including overall presentation- deceives or is likely to deceive the average consumer, even if the information is factually correct, and in either case causes or is likely to cause him to take a transactional decision that he would not have taken otherwise. An extensive black list[28], with practices that are *de facto* misleading is also provided by the Law.

22 Sec. 6 para. 2 nr. 1 UWG.

23 Sec. 6 para. 2 nr. 3 UWG.

24 Sec. 6 para. 2 nr. 5 UWG; sec. 4 nr. 1 UWG.

25 Helmut Köhler and Joachim Bornkamm, Gesetz gegen den unlauteren Wettbewerb UWG, 33rd ed, Beck 2015, p. 806.

26 Helmut Köhler and Joachim Bornkamm, Gesetz gegen den unlauteren Wettbewerb UWG, 33rd ed, Beck 2015, p. 806.

27 Law 2251/1994, article 9d par. 2

28 Law 2251/1994 on Consumer Protection, article 9f which includes the practices identified as

Misleading advertising may not only arise through acts but also through omissions by concealing facts or elements which could be critical parts of the consumer's decision making process. Failure to provide all the critical facts impairs consumers' ability to make informed decisions. This will be the case if material information is hidden or provided in an unclear, unintelligible, ambiguous or untimely manner[29].

In the Swiss jurisdiction, advertising claims have to be factually correct from an objective point of view. In particular, it is considered as unfair competition if factually incorrect or misleading statements are:

a. used to disparage others, their goods, works, services, prices or business relationships;[30]

b. made by a company regarding itself, its company or trade name, its goods, works, services, prices, stock, or its business relationships; or if such statements are made to favour third party competitors;[31]

c. used to compare a company, its goods, works, services or prices with others, their goods, works, services or prices, or if such statements are used to favour third party competitors.[32]

When assessing a potentially incorrect or misleading statement, the overall impression created by the statement is relevant as it would be perceived by the average addressee of the communication.

With regard to prices, the actual total price the consumer has to pay for a product has to be disclosed according to the Federal Ordinance on Price Disclosure.[33] For certain goods and services there are specific rules as to which prices have to be disclosed, including for flights tickets[34] or telephone services.[35]

Furthermore, it is considered to be unfair competition if products or services are repeatedly offered below cost price and if these offers are emphasized in advertising so as to mislead customers.[36]

In all EU Member States any advertisement that contains untruthful information or other information suited to deception is unlawful, especially if the essential characteristics of the goods or services or the nature, attributes or rights of the entrepreneur are concerned.

misleading in Annex I point, 1-23 of European Directive 2005/29

29 Law 2251/1994 on Consumer Protection, article 9e par. 1 and 2

30 Art. 3(1)(a) UCA.

31 Art. 3(1)(b) UCA.

32 Art. 3(1)(e) UCA.

33 Cf. Art. 2(1)(d) in conjunction with Art. 13(1) Federal Ordinance on Price Disclosure.

34 Cf. Art. 11c Federal Ordinance on Price Disclosure.

35 Cf. Art. 11a et seqq. Federal Ordinance on Price Disclosure.

36 Cf. Art. 3(1)(f) UCA.

4. General regulation in the field of advertisement law

The advertising industry is by its nature always pushing its regulatory limits. The rules and regulation in this field have their origins in cultural morality, protection against competitors and consumer protection.

Because of this nature of the advertising industry, advertisement law consists of not only "hard" laws and public regulations but also of "soft" self-regulations, in most jurisdictions referred to as "advertisement codes".

The implementation of the Directive 2005/29/EC, concerning unfair business-to-consumer commercial practices in the internal market, has impacted the field of advertisement law throughout Europe.

In Switzerland, something interesting is to be noticed: The right to advertise is guaranteed by several fundamental rights stipulated in the Swiss Federal Constitution.[37] However, this right is restricted in order to protect public policy interests[38] and to prevent misleading advertising.

Swiss criminal law prohibits discrimination on the grounds of race, ethnic origin or religion.[39] Insofar discriminating advertisement is restricted.[40]

Advertising concerning other types of discrimination (e.g. advertising with sexual motives) is not regulated by law, but declared as impermissible in the principles of the Swiss Commission for Fairness in Commercial Communication.[41]

Swiss law distinguishes between therapeutic products (chemical or biological substances for medical treatment) and medical devices, i.e. products used for medical purposes that are not pharmaceuticals.[42] Advertisement for pharmaceuticals is highly restricted and governed by special regulations.[43]

Advertising for pharmaceuticals is only permitted if the product is registered in Switzerland.[44] Such advertising needs to be clearly distinguishable from editorial

37 These constitutional rights include the right to economic freedom (Art. 27), to freedom of expression and freedom of information and media (Art. 16 and 17), to personal freedom (Art. 10), to freedom of religion and conscience (Art. 15), to freedom of assembly and association (Art. 22 and 23) and the guarantee of ownership (Art. 26).

38 Such public policy interests include the protection of health, minors, public order and protection from discrimination.

39 Art. 261bis Swiss Criminal Code.

40 According to Art. 261bis Swiss Criminal Code it constitutes a criminal offence to publicly incite hatred or discrimination against a person or a group of persons on the grounds of their race, ethnic origin or religion, or to disseminate ideologies that have as their object the systematic denigration or defamation of the members of a race, ethnic group or religion.

41 Principle 3.11 of the Swiss Commission for Fairness in Commercial Communication.

42 Cf. Art. 4(1)(a and b) Federal Act on Therapeutic Products and Medical Devices.

43 Cf. Art. 31 to 33 Federal Act on Therapeutic Products and Medical Devices in conjunction with the Federal Ordinance on the Advertisement of Pharmaceuticals. With respect to advertisements for pharmaceuticals there is a distinction between public advertising and business to business advertising.

44 Art. 32(1)(c) Federal Act on Therapeutic Products and Medical Devices.

contributions.[45] Furthermore, advertising for pharmaceuticals is perceived as unlawful if it is misleading or contrary to public order and morality and if it incites an excessive, abusive or inappropriate use of pharmaceuticals.[46]

Advertisement for medical devices is less regulated. However, also for medical devices, advertisements directed at consumers are prohibited for products that may only be handed out against prescription and for products that are only for use by professionals. Also, advertisements for medical devices that are sold to patients directly and/or that are intended for direct use by patients are restricted.[47]

In Greece, besides the general obligation that requires advertisements to be decent and upright to be found in article 1 of the Greek Code of Advertising and Communication no general regulation blocking content regardless of its target audience exists.

In Austria, a general "non-specified" law may be prohibition law (*Verbotsgesetz* – VerbotsG) with respect to national socialist activities (the target audience is irrelevant in this case).

In Germany, the general regulation is Sec. 3 UWG that states that unfair business acts are unlawful without any specific reference to offensive, pornographic or political advertisements. In the tradition of German provisions dealing with the admissibility of advertisement the accepted principles of morality have been the essential criteria. With the harmonization of the rules and the modification of the old-fashioned UWG the wording changed.

4.1. Regulation regarding the type of audience

In most jurisdictions, such as in Greece, special categories or groups of consumers who are more prone to be influenced are protected from advertising and therefore special provisions are in place. Any advertisement that is contrary to the requirements of professional diligence and materially distorts the economic behavior of consumers, who are particularly vulnerable to the practice or the underlying product because of their age, is by Law[48] unfair and as such prohibited. Children are inexperienced consumers and are therefore easy prey for advertisers and clearly fall under this definition. The inclusion in an advertisement of a direct exhortation to children to buy advertised products or persuade their parents or other adults to buy advertised products for them is prohibited[49].

However, not any kind of advertisement targeting children is prohibited. Only the kind that distorts their buying behavior by leading them to enter into transactions which do not seem logical and into which they would not have entered had they had the necessary and required experience. Furthermore for the advertisements to be deemed as illegal, these will have to specifically target children, a fact that will be deducted from their content and messages they convey. If they are appealing to the

45 Art. 5(4) Federal Ordinance on the Advertisement of Pharmaceuticals.

46 Art. 32(1)(a and b) Federal Act on Therapeutic Products and Medical Devices.

47 Cf. Art. 21 Ordinance on Therapeutic Products.

48 Article 9c of Consumer Protection Law (2251/1994)

49 Idem article 9H par. 5

general consumer public it will be more difficult to establish abuse.

In any event the broadcasting of advertisements of alcoholic beverages during children's programs or during the children zone is forbidden[50].

In Switzerland, there are advertising restrictions regarding alcohol and tobacco products in order to protect minors (persons below 18 years of age). This provides for a good example of similar regulations all over the world.

Swiss law distinguishes between alcoholic beverages in general, including wine and beer,[51] and spirits in particular.[52] Whereas advertising and sponsoring for alcoholic beverages in radio and television is generally permitted with certain restrictions,[53] it is completely prohibited for spirits.[54]

Advertising of alcoholic beverages which aims at minors is prohibited. Particularly, advertising is prohibited a) at places, which are mainly visited by young people, b) in publications which are targeted at young people, c) on objects which are mainly used by young people and d) on objects which are distributed to young people free of charge.[55] Advertisements for spirits are subject to further restrictions.[56]

The Tobacco Ordinance provides that tobacco advertising aimed at minors is prohibited. Particularly, it is forbidden to promote tobacco products and smoking products with tobacco substitutes a) at places, where young people mainly stay; b) in newspapers, journals or other publications, which mainly aim at young people; c) on school material; d) on advertising objects which are distributed to young people free of charge; e) on toys; f) with free of charge gifts of tobacco products to young people; and g) at cultural, sports or other events, which are mainly attended by young people.[57] The Federal Act on Radio and Television prohibits advertising and sponsoring on radio and television for tobacco products.[58]

In Germany and Austria regulkations regarding the protection of an audience consisting of children are well illustrated: in Austria, with respect to children, the standard requirements for the deception of the consumer according to Art 2 of the Austrian Competition Law are much lower. This target audience is of a very sensitive nature. In addition to that encouraging children to buy something is absolutely forbidden (*per-se-Verbot* according to Clause 28 of the Annex to the Austrian Competition Law).

Under German jurisdiction, any advertisement that includes a direct request to

50 Article 10 par. 4 of Presidential Decree109/2010

51 That is all beverages with an alcohol content of more than 0.5%.

52 Spirits (i.e. liquors such as vodka, gin, whisky) are defined in the Federal Act on Spirits as beverages containing ethyl alcohol (i.e. have been obtained through distillation). This may also include beverages with a low alcohol content, such as pre-mixed beverages (also called "Alcopops") containing spirits. Besides spirits, also vermouth, or liqueur-wines such as sherry or port with an alcohol content of over 15% by volume are subject to this alcohol legislation.

53 Cf. Art. 16 Federal Ordinance on Radio and Television.

54 Cf. Art. 10(1)(b) and Art. 12(4) Federal Act on Radio and Television.

55 Cf. Art. 11(3) Federal Ordinance on Foodstuffs and Utility Articles.

56 Cf. Art. 42b Federal Act on Spirits.

57 Cf. Art. 18 Tobacco Ordinance.

58 Cf. Arts. 10(1)(a) and Art. 12(4) Federal Act on Radio and Television.

children to purchase the goods or services marketed or to persuade their parents or other adults to do so is an illegal commercial practice.[59] If an advertisement is also but not exclusively targeted at children under the age of 14 it is unlawful.[60] In assessing whether a direct request exists the specific wording, especially use of children's language or expressions as well as anglicisms, has to taken in to account.[61]

5. Ad blockers

So far the issue of deploying *ad blockers* has not been dealt with by the legislators. Ad blocker software is generally considered permissible both under unfair competition law aspects and under EU as well as Swiss competition (i.e. antitrust) law.

With respect to unfair competition law, ad blocker software that generally blocks unsolicited advertising does not raise concerns as long as users are made aware of the ad blockers function. On the other hand, software that would specifically aim to block advertising of certain competitors could potentially be viewed as unfair.

With respect to competition (i.e. antitrust) law, concerns may arise if advertisers may pay a provider of ad blocker software to ensure that the advertiser's communications will not be blocked (so-called "whitelisting"). However, such business practice would likely not raise competition law concerns unless the software provider abuses a dominant position on the relevant market.

In Germany, in 2004, the *Bundesgerichtshof* (German Federal High Court) decided that advertising and promotion of an ad blocker is permissible.[62] The use of an ad blocker does not deliberately obstruct a competitor. Moreover the use of an ad blocker does not violate copyright laws.[63]

As ad blockers so far do not encounter regulatory issues, the counter measures against ad blockers are more dangerous in terms of compliance: would it, for example, not be arguable that blocking users from content if those users use an ad blocker vilates consumer protection, privacy- and or anti trust regulations? The issue of ad blockers and counter measures can provide for a good discussion during the working session in Munich.

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59 Sec. 3 para. 3 UWG, Annex to Section 3 para. 3 nr. 28 UWG.

60 Bundesgerichtshof, „*Runes of Magic II*" [18.09.2014], I ZR 34/12 (KG), GRUR 2014, p. 1211 ff.

61 Bundesgerichtshof, "*Runes of Magic*" [17.07.2013], I ZR 34/12, NJW 2014, p. 1014 ff.

62 Bundesgerichtshof, "*Zulässigkeit von Fernseh-Werbeblockern*" [24.06.2004], I ZR 26/02, GRUR 2004, p. 877 ff.

63 Landgericht München I, "*Zulässigkeit von Werbeblockern*" [27.05.2015], 37 O 11673/14, MMR 2015, p. 660 ff.

6. Sanctions in advertisement law

Any wrongful claim or non compliant advertising could give rise to claims for damages or ro court orders to cease and desist any further use of the advertisements and claims concerned.

In Greece, for example, any consumer or consumer organization is entitled to take legal action[64] against misleading advertising and request from the Court to order the cessation of the advertising and its omission in the future but also to seek compensation for any damages caused. Furthermore the plaintiffs have the right to request publication of that decision in full or in part and in such form as they deem adequate but also to request in addition the publication of a corrective statement. Especially the last remedy is of significant importance as it is rather unlikely that all the consumers that were exposed to the misleading advertising will be informed about the outcome of the trial and this way the widest possible audience will be reached.

The Minister of Development has also the right to order the cessation of the misleading advertising if this is dictated by reasons concerning public interest.

In the case of comparative advertising or any other kind of advertising that harms competitors' interests these have the right to take action on the basis of unfair competition law provisions. In such cases the court may instruct the defendant to cease and desist from the illegal advertising, it may order the publication of the courts decision and/or the publication of a corrective advertisement or corrective declaration and it may also award damages.

Under Swiss Law, Violations of the relevant advertising regulations can constitute criminal offences. According to Swiss law, in general and with certain exceptions only natural persons may be prosecuted. As a result, the below criminal sanctions would apply to the persons within a company responsible for the criminal acts.

Violating advertising regulations can constitute a criminal offence subject to the following sanctions:

a. Health claims: Violating the regulations regarding health claims constitutes a criminal offence punishable by a maximal fine of CHF 40,000.[65] In case of negligence, the fine amounts to a maximum of CHF 20,000.[66]

b. Unfair competition: Willful (but not negligent) unfair competition within the meaning of Art. 3 UCA constitutes a criminal offence punishable by a monetary fine of up to CHF 1,080,000 or imprisonment of the responsible managers for up to three years. These offences are not prosecuted ex officio, but only if someone files a criminal complaint.[67]

c. Alcoholic beverages and tobacco products: Willful violations of the advertising

64 Law 2251/1994 on Consumer Protection, article 9i par. 1 and 2

65 Art. 48(1)(k) Federal Act on Foodstuffs and Utility Articles.

66 Art. 48(1bis) Federal Act on Foodstuffs and Utility Articles.

67 Cf. Art. 23(1) UCA in conjunction with Art. 34 Swiss Criminal Code.

restrictions relating to alcoholic beverages and tobacco products constitute a criminal offence punishable by a maximal fine of CHF 40,000.[68] Negligent violations are punishable by a fine of up to CHF 20,000.[69]

For acts of unfair competition, the UCA provides for three kinds of civil law remedies:

d. A person affected by an act of unfair competition may request the court to prohibit an imminent infringement, to remove an ongoing infringement, or to declare the unlawful nature of an infringement if its consequences still subsist.[70]

e. Besides or in addition to these remedies, a person affected by an act of unfair competition may require that a rectification or the judgment be communicated to third parties or be published.[71] These sanctions are only granted if they are considered adequate, necessary and proportional in the individual case.

f. A person affected by an act of unfair competition may claim financial compensation (damages or the disgorgement of profits).[72]

Furthermore, for acts of unfair competition and violations of the principles of the Swiss Commission for Fairness in Commercial Communication a complaint with the commission can be filed. Although the decisions of the commission as a self-regulation authority are not enforceable in the same way as civil judgments, they may be published.

Also in Austria, both public fines and private sanctions are covered by law.

With respect to the Austrian Competition Law in detail the legal instruments of restraining orders, actions for an injunction, removal and claims for damages are at one´s disposal and (very restricted) criminal-law protection and administrative penalties have been implemented.

In the German jurisdiction, sanctions for the use of unlawful a commercial practice can be elimination, and in the event of the risk of recurrence, cessation and desistance.[73] Where the contraventions are committed in a business by a member of the staff or by a person exercising a mandate, the claim to cessation and desistance and the claim to elimination shall be deemed to apply in relation to the owner of the business as well. In case of an intentional negligently use of an unlawful illegal commercial practice (advertisement) there is also a sanction to compensate competitors for the damage arising therefrom.[74]

Whoever intentionally uses an illegal commercial practice, thereby making a profit to the detriment of numerous purchasers, can be sued for surrender of such profit to the Federal budget.

68 Art. 48(1)(l) Federal Act on Foodstuffs and Utility Articles.
69 Art. 48(1bis) Federal Act on Foodstuffs and Utility Articles.
70 Cf. Art. 9(1) UCA.
71 Cf. Art. 9(2) UCA.
72 Cf. Art. 9(3) UCA in connection with the Swiss Code of Obligations.
73 Sec. 8 UWG.
74 Sec. 9 UWG.

In specific cases unlawful advertising may lead to regulatory offences[75] or criminal liability.[76]

7. Intellectual Property

As a general rule, a third party's intellectual property rights may not be used to advertise the advertiser's own goods or services, or to suggest a (non-existing) affiliation between the third party and the advertiser. Doing so may constitute on infringement of intellectual property rights (e.g. trademark infringement) and/or unfair competition. However it is in most jurisdictions allowed to use a competitors brand as reference. For instance, a garage specialized in BMW repairs may normally state in his advertisments that he is specialized in BMW repairs.

7.1. Trademarks and copyright in advertising

In Greece, the current legal framework regulating advertising does not contain specific provisions regarding the use of IP rights in advertisements. In general, third parties are not entitled to use registered trademarks in commercial advertising for their own products/services unless a license has been obtained. Nevertheless it is an often observed phenomenon that new-entrants into a specific market or market segment use established trademarks in order to free ride on their goodwill by creating an association between the two competing products (e.g. "better taste than Coca Cola") or even creating an association between two products that are irrelevant (e.g. "the Rolls Royce of boats"). Of course using such a trademark where it is necessary in order to indicate the intended purpose of a product or service, in particular as accessories or spare parts, in accordance with honest practices in trade or commerce[77] does not qualify as an infringement.

Besides trademarks, advertisements very often use or include works of literature (written texts), art (musical compositions) or science (architectural plans) all of which enjoy copyright protection[78]. However, the main idea of an advertisement is not protected by copyright in itself, only the form through which this is expressed. This is because in most cases the idea will fall short from the originality threshold necessary in order to qualify for such protection[79]. Nevertheless, given that most advertisements are the result of creative processes they might be entitled to copyright protection, even if they are based on existing ideas, depending of course on the level of originality they show.

In many ways there are possibilities to legally use competitors' trademarks when advertising. In Switzerland, for example, a third party's intellectual property rights (e.g. a trademark) may be used in advertising if such use serves a legitimate purpose and if the use is made in an objective and factual manner (e.g., advertisements with price comparisons, the advertisement for complementary accessories to original

75 Sec. 15 HWG.
76 Sec. 16. UWG; sec. 14 HWG.
77 Idem article 126
78 Article 2 par.1 of Law 2121/1993 on Copyright
79 Idem

products, or advertisements for repair services focusing on certain brands).[80]

If the third party's intellectual property rights (e.g. a trademark) have already been exhausted (e.g. branded goods have already been put on the market by the original manufacturer), a reseller may use the third party's intellectual property rights in its own advertising to the extent this is necessary to inform the public about the goods offered by the reseller. However, the reseller's advertising may not create the impression of an affiliation or licensing relationship between the third party and the reseller.

7.2. AdWords

Google allows for the practice of purchasing trademarks as "AdWords": the result is that a google-user typing in the concerned trademark will get "natural results" and "sponsored results", whereby the first will show results relating to the tradmerk used, and the latter will (also) feature a search result directing to the purchaser of the conerned trademark as an AdWord. Trademark owners often do not agree with the advertisers' use of its trademark and claim trademark infringement against the advertisers.

In different jurisdictions, this practice is treated differently, but in general one can say that the main point of reference is that the AdWord campaign may not confuse the google-user with regards to the origin of the advertisement or link shown as sponsored result because of the use of a trademark as AdWord.

In Greece, so far the limited case-law regarding "adwords" is aligned to that of the CJEU, meaning that the proprietor of a trade mark is entitled to prohibit an advertiser from advertising, on the basis of a keyword identical with that trade mark which that advertiser has, without the consent of the proprietor, goods or services identical with those for which that mark is registered, in the case where that ad does not enable an average internet user, or enables that user only with difficulty, to ascertain whether the goods or services referred to therein originate from the proprietor of the trade mark or an undertaking economically connected to it or, on the contrary, originate from a third party.

In Switzerland, to date, there are only two published decisions on this issue. Both are from lower courts and they come to different conclusions:

In a 2012 decision on preliminary measures, the Superior Court of the Canton of Thurgau decided that the use of a third party trademark in keyword advertising does neither constitute a trade mark infringement, nor unfair competition.[81] The court in particular relied on the fact that the word used as a keyword is not shown to the internet user, which – according to the court – means that the keyword is not used as a trademark. This corresponds to what seems to be the prevailing view of Swiss scholars on this issue.[82]

On the other hand, the Cantonal Court of Lucerne decided in 2015 that the use of a

80 Cf. Marbach/von Büren/David, paras. 1505 et seqq.

81 sic! 2012, "Ifolor", p. 387.

82 David/Reutter, paras. 390 et seq.; Thouvenin/Dorigo, paras. 46 et seqq. to Art. 13; cf. Reinle / Obrecht, pp. 117 et seqq.

third-party trademark as a Google Ad Word by a competitor offering similar services as the ones for which the trademark is protected constitutes trademark infringement.[83]

Austria is the jurisdiction of origin of one of the first famous cases related to AdWords: OGH 17Ob3/10f ("Bergspechte")

The use of a brand (a brand component) of a third party as a keyword generating advertising does not infringe the rights of a trade mark owner, if the normal and reasonably attentive internet user easily recognizes, that the goods and services advertised neither originate from the proprietor of the mark nor of an economically associated company.

In Germany, as a result of the decisions of the ECJ[84] the main criteria concerning the admissibility of a Google ad word campaign is if using an ad word an adverse effect on the function of indicating origin. The question whether that function of the trade mark is adversely affected depends in particular on the manner in which that ad is presented. The function of indicating the origin of the mark is adversely affected if the ad does not enable normally informed and reasonably attentive internet users, or enables them only with difficulty, to ascertain whether the goods or services referred to by the ad originate from the proprietor of the trade mark or an undertaking economically connected to it or, on the contrary, originate from a third party.[85]

In 2011, the *Bundesgerichtshof* decided that the function of indicating the origin of the mark is not adversely affected if the search results (using the ad word) are presented in a separate list of advertisements whereas the search results without using the ad word are presented in another list.[86] The list displaying the search result using the ad word is clearly separated from the other list. In addition, there is no adversely affect as this list is under the heading *Anzeige,* the German word for advertisement. Moreover the link shown in the list did not contain any relation to the mark.[87]

In another decision the *Bundesgerichtshof* decided that using an ad word adversely affected the function of indicating the origin of the mark.[88] In this case the defendant did not clarify that it is not an undertaking economically connected to the trademark owner.

In conclusion admissibility of the use of trademarks of others as "Ad Words" in a Google ad word campaign depends on the concrete design of Google's presentation of the search results if the mark itself is not used/displayed in the presentation.

83 sic! 2015, "Aquaterra Travel (fig.)", p. 392.

84 Europäischer Gerichtshof, "Google ad words " [23.03.2010], C-236/08, C-237/08, C-238/08, GRUR 2010, p. 445 ff.

85 Europäischer Gerichtshof, "Google ad words " [23.03.2010], C-236/08, C-237/08, C-238/08, GRUR 2010, p. 445 ff.

86 Bundesgerichtshof, "Bananabay II" [13.01.2011], I ZR 125/07, GRUR 2011, p. 828 ff.

87 Bundesgerichtshof, "Bananabay II" [13.01.2011], I ZR 125/07, GRUR 2011, p. 828 ff.

88 Bundesgerichtshof, "Fleurop" [27.06.2013], I ZR 53/12, GRUR 2014, p.182 ff.

8. Conclusion

Summing up, Advertisement Law provides a highly fertile base for discussion. Old issues as Intellectual Property aspects, misleading claims and wrongful comparisons meet new issues as adblockers, branded content et cetera, all in an ever developing legal setting of diverse but converging jurisdictions and of systems of self-regulation.

Briefly stated and coming back to the introduction of this report, tit can be said that advertisement law consists of several main elements with the following key points attributable thereto:

a. regulations regarding health claims - early area of relatively strict regulations;

b. regulations regarding comparative claims - area formed mainly by commercial litigation;

c. regulations regarding wrongful claims - area formed mainly by commercial litigation and consumer protection legislation;

d. general regulation on advertisements' contents - highly influenced by public morality;

e. regulations regarding types of audiences - highly influenced by public morality ;

f. practices and regulations regarding *ad blockers* - an area in full development;

g. sanctions - both public and private but mostly private through litigation;

h. intellectual property in advertisements - a fertile base for commercial litigation.

8.2. National reports

This general report leans heavily on the national reports from Switzerland, Germany, Austria and Greece.

a. For Germany: Felix Barth

b. For Switzerland: Philipp Groz

c. For Greece: Stefanos Tsimkalis

d. For Austria: Wolfpaul Finder

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