

# COMMENTS

## ***Interflora* in Reverse: Higher Regional Court of Frankfurt on Keyword Advertising**

**Dr Kai Schmidt-Hern**

*Partner, Lubberger Lement, Berlin*

☞ Advertising; EU law; Germany; Keywords; Search engines; Trade marks

### **Abstract**

*In a recent decision, BeckRS 2019, 2487—Polzar, the Higher Regional Court of Frankfurt ruled on a case of keyword advertising. The case shows that the concept of “vagueness” pursuant to the ECJ’s judgment in Interflora is potentially vast. In general, the judgment provides an opportunity to discuss the premises of the ECJ’s and BGH’s jurisprudence on keyword advertising.*

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### **Facts**

The plaintiff Mr Polzar provides orthodontal treatment. The defendant is an orthodontist too, and, additionally, runs a network of orthodontists called “ilovemysmile”. The network covers 17 German cities, with one network member present in each of them. The defendant operates an internet portal under the URL *ilovemysmile.de*, where customers can book appointments with the network member of their choice.

The defendant had placed an ad for the network with the online search engine *web.de*. *Web.de* offers keyword advertising, as do Google and other providers of search engines. The defendant had booked the name “Polzar” as a keyword to trigger her ad.

The ad itself did not mention the name “Polzar”, and it did not refer to the plaintiff in any other way. The ad contained the name (*ilovemysmile*) and the URL (*www.ilovemysmile.de*) of the network, as well as the brand of orthodontic appliances that all of the network’s members offer (“*Invisalign*”).

The plaintiff filed for a preliminary injunction based on a violation of the rights to his trade name “Polzar”. The Regional Court of Frankfurt turned down the application. It found that the ad had not affected the function of origin of the plaintiff’s trade name.

### **Judgment**

On appeal, the Higher Regional Court decided that the plaintiff’s application for a preliminary injunction was well founded. As the defendant operated a network of orthodontists, the public was likely to assume that the plaintiff is part of that network. Thus, in order to avoid that misconception, the defendant should have clarified that there was no economic link between defendant and plaintiff. The fact that the ad had displayed the name and URL of the defendant does not dispel the misconception. The public expected separate companies that have economic links to act under different names and to maintain separate online presences.

The Higher Regional Court of Frankfurt mainly relies on the *Interflora* judgment of the ECJ and the *Fleurop* case of the BGH. In *Interflora*, 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 advertised that the internet user is unable to tell, or is able to tell only with difficulty, whether the advertiser and the trade mark owner are linked or not.<sup>1</sup> Specifically, the ECJ held that, if the trade mark 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. The *Fleurop* case of the BGH, which the Higher Regional Court has relied on as well, corresponds to *Interflora* with regard to facts and law. There, the trade mark owner and plaintiff operated a vast and well-known network of flower delivery services much like *Interflora*. Just like the UK High Court of Justice in its *Interflora* decision following the reference to the ECJ, the BGH found that the defendant would have had to clarify in the ad that it is not a member of that network.

The Higher Court of Frankfurt applies the principles of *Interflora* despite two differences in the set of facts: first, the present case represents the reverse situation of *Interflora*: in *Interflora*, the plaintiffs went against the

<sup>1</sup> *Interflora Inc and Interflora British Unit v Marks & Spencer Plc and Flowers Direct Online Ltd* EU:C:2011:604 at [45].

false impression that the defendants were members of their network. In the present case, the plaintiff goes against the false impression that he is a member of the defendant's network. Either way, the Higher Court of Frankfurt concluded, the public may assume economic links between plaintiff and defendant where there aren't any. Second, in the *Interflora* case, the keyword in question, "Interflora", was the trade mark of a well-known network. The network of orthodontists in the present case is not well known. The Higher Court, however, held that the question of whether the public was aware of the defendant's network before having seen the ad, was irrelevant, as the public learned about the network from the ad itself. Once the public learned this, it may have falsely assumed economic links between defendant and plaintiff.

## Comments

### *ECJ and BGH jurisprudence*

The decision of the Higher Court of Frankfurt is in line with the BGH's jurisprudence which, for its part, implements the jurisprudence of the ECJ. At the same time, the Higher Court has utilised the leeway which the ECJ allows the national courts in favour of the plaintiff:

According to the ECJ, keyword advertising as such does not run contrary to the advertising function of the mark. The finding of an infringement requires that the use impairs the function of origin of the mark. That depends on the appearance of the ad in question. Infringement occurs if the ad does not enable reasonably well-informed and observant internet users, or enables them only with difficulty, to ascertain whether the goods or services referred to by the ad originate from the trade mark owner or an undertaking economically connected to it or, on the contrary, whether they originate from a third party.<sup>2</sup> In such a situation, the internet user may err as to the origin of the goods or services in question.<sup>3</sup> So, if the ad suggests that there is an economic link between the advertiser and the trade mark owner, it affects the function of origin adversely. The same is valid where an ad, without actually suggesting an economic link, is so vague on the origin of the goods or services that the internet user is unable to determine, on the basis of the advertising link and the ad's content, whether the advertiser and the trade mark owner are economically linked or not.<sup>4</sup> Whether that is the case is up to the national courts.

The BGH has established that the function of origin of a trade mark or a trade name is regularly not affected by being used as a keyword under the following conditions<sup>5</sup>:

- The ad appears in an advertising area which is expressly designated as such, e.g., by the words "Ad" or "Advertisement", and which is clearly separate from the general 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 does not assume that the ad comes from the trade mark owner or from companies linked to the owner, according to the BGH. And if there is no such assumption, the ad needs to clarify the lack of a link expressly only in exceptional cases. The *Fleurop* case of 2013 constituted such an exception; the Higher Court of Frankfurt has added a variant to that exception

### *The changing face of keyword advertising*

In keyword cases, there could be debate on whether the factual basis of the ECJ's and BGH's assumptions has changed so much that these assumptions need to be re-assessed.

The leading cases of the ECJ and the BGH are based on certain categorial assumptions on how the public perceives keyword advertising. These assumptions are based on how the Google search layout looked at the time. That look has changed considerably. The *Google France* decision is based on the layout of 2008. Back then ads appeared almost exclusively in a separate block on the right side of the results page. That advertising block was marked with "Ads" on top. Any ads that did not appear in that block, but on top of the general search results instead, had a yellow ochre background. Against this background, the distinction between general search results and paid results was rather obvious for anyone who was aware that there were search results of both kinds. Today, the separate advertising block on the right side of the results page no longer exists. Ads only appear at the top and at the bottom of the one column of search results. Each ad is marked with the word "ads" in bold. The yellow ochre background has vanished. In addition, most searches now generate a further category of paid results, which come from "Google Shopping" and other price comparison platforms, and which appear above all other search results. They include pictures of the products advertised.

With these changes and additions, one may argue that the results page is harder to decipher than before. The condition established by the BGH that there has to be an advertising area clearly separate from the general search results does not seem to be fulfilled anymore. The BGH has already acknowledged that development. In the *Fleurop* decision, the BGH held in an obiter dictum that, if ads appear above and below the general search results

<sup>2</sup> *Interflora* EU:C:2011:604 at [44]; *Google France and Google*, paragraphs 83 and 84, and *Portakabin*, paragraph 34.

<sup>3</sup> *Interflora Interflora* EU:C:2011:604 at [44]; *Google France and Google*, paragraph 85.

<sup>4</sup> ECJ, *Google France and Google*, paragraphs 89 and 90, and *Portakabin*, paragraph 35; *Interflora*, 45.

<sup>5</sup> BGH, [2011] G.R.U.R. 828 at [26], [27] *Bananabay II*; BGH, [2013] G.R.U.R. 290, at [26] *MOST-Pralinen*; BGH, [2014] G.R.U.R. 1124 at [20]—*Fleurop*.

and not in a separate block on the right side, the internet user is more likely to perceive such ads as general, i.e. unpaid search results. With that layout, specific care has to be taken to distinguish ads from general search results, according to the BGH.<sup>6</sup>

Further, it may be of merit to keep open the discussion about whether and to what extent the general public is able to tell search results and paid results apart. Surveys commissioned by the German Association of Online Traders in around 2010 suggested that large parts of the general public were not aware of the distinction between general and paid search results to begin with. While the average internet user of today may be more competent in that respect than the user of 2010, it has become harder to make that distinction with the current layout of the results page.

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<sup>6</sup> BGH, [2014] G.R.U.R. 182 at [36]*Fleurop*.