

UPDATE: Federal Court of Justice bans ads for virtual items in online game – reasons for judgment available, but not final



This summer, the highest German civil court, the Federal Court of Justice (*Bundesgerichtshof*; "BGH"), has created a considerable stir – and some degree of confusion – in the industry by ordering the operator of the online fantasy game "Runes of Magic" to cease using certain language to advertise additional online content available for purchase.

More specifically, the contested wordings included the sentence "*Seize the advantageous opportunity and add that certain something to your armour & weapons*". The plaintiff was a consumer watchdog organisation.

The BGH considered the language a direct exhortation to children to purchase the items, which is prohibited by unfair commercial practices legislation.

Is this the end of the free-to-play business model in Germany, as some commentators have speculated? How should online games providers conduct themselves in the future?

The written reasons for the decision (docket no.: I ZR 34/12) are now finally available, but they add little to the debate, are contradictory and not convincing. However, for procedural reasons, the operator of the game can still challenge the ruling.

What is it all about?

The games provider published the following language on an online message board associated with the game, under the heading „*Die Pimp-Woche*“ (Literally, “the pimping week” – the English term “to pimp” is sometimes used in contemporary German in its slang meaning as “to embellish” or “to enhance”):

“Thousands of dangers are waiting for you and your character in the wide world of Tabora. Without the proper preparation, the next corner you round in that dungeon could be your last. This week again you have the opportunity to vamp up your character. Seize the advantageous opportunity and add that certain something to your armour & weapons. From Monday [...] through Friday [...], you have the opportunity of upgrading your character.”

The portion “*upgrading your character*” was linked to the item shop in which registered users could purchase virtual items for the game.

The court’s decision

The BGH saw this language as an illegal direct exhortation to children to buy the relevant items. The BGH’s position that the ad targeted children is essentially based on the following analysis:

According to the court, the language used in the advertisement made it clear that the invitation to make a purchase also targeted children. In making this finding, the court relies on the address with the German informal “you” (the German language has different words and grammatical constructions for “formal” and “informal” address, the latter being commonly used for family, close friends and children) and the use of words like “pimp” and “vamp up”, which it considers typical for children’s speech.

The court also refers to “anglicisms”, implicitly relying on the use of the English terms “pimp” and “dungeon” in the ad, which it considers typical of children’s speech.

The issue of accepting payment through a text message based service, which had been discussed at the hearing as an indication that children were targeted, is conspicuously absent from the written reasons for judgment.

With its decision, the BGH takes a position opposite both lower courts that have heard the case. Before the BGH, as the final appeal jurisdiction, decided in favour of the plaintiff and against the defendant, both the Regional Court of Berlin and the Higher Regional Court of Berlin had reached contrary conclusions. The Regional Court dismissed the claim based on the argument that the advertisement did not concern a specific product. It was not clear from the advertisement, which specific product offered in the online store was the subject of any exhortation to make a purchase. The Higher Regional Court agreed with this analysis and rejected the appeal as “obviously without merit”.

Legal background

The BGH found the advertisement to be illegal commercial practice under § 3 para. 3 of the German Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*; “UWG”) in connection with no. 28 of the appendix to the UWG (the so-called Black List).

Under this no. 28 of the Black List, it is an illegal commercial practice to include in an advertisement a direct exhortation to children to buy advertised products or services or persuade their parents or other adults to do so. This provision is based on an EU directive on unfair commercial practices (Directive 2005/29/EC of May 11, 2005), which also contains such a Black List with almost identical provisions.

The term “Child” is not defined either in the UWG or in the aforementioned EU directive. However, it appears that the majority of legal scholars and practitioners assume, based on other EU legislation, that the relevant cut-off age is 14 years. In its decision, the BGH brushes aside this problem and states that the ad in any event targets minors under the age of 14 because it uses the informal “you”, typical children’s vocabulary, and “common anglicisms”.

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The reasons for judgment are contradictory insofar as they also explicitly say that the use of the informal "you" nowadays is not uncommon in ads addressing adults; the same is obviously true of English language words and advertising claims and slogans. This leaves only the allegedly "typical" children's speech – but the court's reasons are very vague on what words precisely it considers to fall into this category, making the decision ultimately unconvincing and unhelpful.

Under the EU directive (art. 2 i)), an "exhortation to buy" is "a commercial communication which indicates characteristics of the product and the price in a way appropriate to the means of the commercial communication used and thereby enables the consumer to make a purchase". In the case decided by the *BGH*, the characteristics of the advertised item were not in fact specifically identified.

However, the *BGH* considers that the hyperlink to the online store is sufficient, as consumers were used to the mechanism of clicking links to retrieve additional information on websites. The court therefore saw the ad and the online store site it linked to as one unit.

Finally, under the applicable statutory rules, the exhortation must be "direct". Such is the case when the exhortation to purchase the virtual item is intended to induce the purchase decision. There cannot be an additional step between exhortation and the arising of the purchase decision. This direct or immediate character lacks in particular when children have to deduce from other elements that they should make a purchase. Therefore, while the invitation "Get this sword for only 2.99 Euros!" is a direct exhortation, a wording like "Wouldn't it be great to enhance your weapons?" should not be problematic.

Game over?

After the decision was reported, many commentators took the position that this *BGH* verdict threatened the entire "free-to-play" model in Germany. As the last few months have shown, this is not the case. However, the written reasons for judgment have not significantly clarified the law with regards to permissible advertising.

It is important to note that the decision is only a default judgment, and the operator of the game is challenging it – now that it actually knows the precise reasons. This right of objection enables the game operator to make further legal submissions and obliges the court to review its decision.

It is by no means excluded that the *BGH* changes its stance during the objection procedure or that it asks the ECJ for a common interpretation of the directive. Arguably, it would need to do so at least concerning the definition of the term "Child".

What does the decision mean for Freemium offers, children's games and children's apps?

It can be expected that consumer watchdog groups and potentially also competitors will take an even closer look at advertising language in or with regards to online games. Furthermore, challenges to terms and conditions and privacy policies have been on consumer watchdogs' agendas for quite some time now. This does not only apply to browser and client based games, but also to mobile apps.

Operators of online games, children's games and children's apps should therefore closely monitor the further legal developments in this area. As a consequence of the *BGH* decision, even greater care should be exercised in making advertising language legally compliant. Direct purchase invitations to children should be avoided at all costs. The selection of available payment methods seems to play a certain role in the legal analysis.

Checklist:

- Where terms and conditions state a minimum age, it might be argued that ads for in-game items cannot be targeted at younger individuals.
- Terms and conditions (and privacy policies) need to be adapted to German law. Merely translating "universal" terms is not a solution.
- Advertisements within or with regards to a game and the embedding of advertisements as such should be legally vetted and, when in doubt, worded more carefully (indirectly).



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