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Abstract
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HOW MUCH NATURE FOR THE CONSUMER? MISLEADING ADVERTISING, TRADEMARK LAW AND THE EUROPEAN AVERAGE CONSUMER STANDARD IN THE FOOD SECTOR

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In Europe, the rules of unfair competition law have particular relevance for the regulation of advertising and product designation in the food sector. Apart from sector specific rules, the general framework of unfair competition law which applies is governed by the Unfair Trade Practices Directive (2008) that brought full harmonization of consumer protection laws in the unfair competition field.

As early as the mid-1990s, the European Court of Justice started changing the regulation of advertising and product designation threshold by introducing the standard of the average European consumer who is informed, attentive and reasonable, unlike the German consumer who was quite helpless and uninformed in the eyes of the courts. The ECJ´s liberal stance has had far-reaching consequences on the requirements for producers concerning advertising and labelling of their products.

But how far can it go? Is it enough to put a mass of unintelligible words in small print on the back of a product label and assume an informed consumer? For the average consumer this means that besides normative elements, (behaviour deriving from a standard, or norm) the standard should refer more to empirical data (quantifiable or measureable data) provided by consumer research to narrow the gap between the legal standard and the real need for protection of the consumer. All three elements of the average consumer standard are open to take up this approach to provide the necessary balance between the interests of the producer and the consumer. This analysis is relevant for trademark law also.

EUROPEAN CASE LAW

The *Prantl* case

It started with wine. § 17 of a German Wine Regulation limited use of the special shape of a bottle ('Bocksbeutelflasche') to wine producers in Franken, southwest Germany; stemming from the classification of 'Bocksbeutelflasche' as a designation of origin. Prantl, a wine producer from South Tyrol, imported wine to Germany in 'Bocksbeutel' bottles and was then banned from doing so by the German courts. Upon referral of the case, the ECJ stated that the pertinent regulation is incompatible with free movement of goods (Art 34 of EU Treaty), as long as use of this bottle in the country of origin was in line with common practice and fair competition. Moreover, The ECJ used this case to define the European standard of the 'average consumer'.

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While the definition of the German consumer can be regarded as one of the most inflexible in the world ('German case law is based on the standard of an absolutely uneducated, almost pathologically stupid and negligently inattentive average consumer', ECJ Slg 1984, 1299) the Court stressed that a European standard should refer to an average consumer as, 'normally informed and adequately attentive and reasonable'.[2] As to the case at issue, European labelling provisions were sufficient to inform consumers.

Darbo case

In 2000, the ECJ issued a strong decision in the *Darbo* case.[3] Darbo manufactures strawberry jam in Austria, which it markets in that country and in Germany under the name 'd'arbo naturrein' (naturally pure) and under the description, 'Garten Erdbeer' (garden strawberry). The labelling on the packaging of the jam bears the following wording;

> In 1879, the Darbo family commenced jam production. Today, d'arbo jams are still made according to a Tyrolean recipe which has been handed down. They are heated and stirred carefully. Thus valuable vitamins and the natural aroma of the fruit are preserved. Garden strawberry, Special quality jam, Made from at least 50g of fruit per 100g, Total sugar content 60g per 100g. Keep cool after opening. Ingredients: strawberries, sugar, lemon juice concentrate, pectin gelling agent.

The pectin gelling agent in the jam is made up of 'dilute acids obtained principally from the inside of citrus fruit peel, fruit pomace or shredded sugar beet.' According to analyses carried out in Germany, the jam also contains - as traces or residues - the following levels of various substances: less than 0.01 mg/kg lead, 0.008 mg/kg cadmium and 0.016 mg/kg procymidone (pesticide) and 0.005 mg/kg vinclozolin (pesticide).

A consumer association asked for an order that the word 'naturrein' (naturally pure) should no longer be used for d'arbo jam on the ground that such use was contrary to Article 17(1)(4) and (5) of the LMBG, for three reasons. It argued that first, the pectin gelling agent is an additive, within the meaning of subparagraph 4, which consumers do not expect to find in the jam in question because of the description 'naturrein'; second, the latter term is likely to mislead consumers in that the air or the land from which the fruit used in the jam originates is contaminated by pollution, and, third, in view of the residues of lead, cadmium and pesticide in the jam, it cannot be described as 'naturally pure'.

The ECJ rejected the first argument relating to pectin, and pointed out that its presence in d'arbo jam is indicated on the label on the packaging in accordance with relevant European law. It also stressed that consumers whose purchasing decisions depend on the composition of the products in question will first read the list of ingredients, the display of which is required by Article 6 of the Directive. In those circumstances, an average consumer who is reasonably well informed and reasonably observant and circumspect could not be misled by the term 'naturally pure' used on the label simply because the jam contains pectin gelling agent whose presence is duly indicated on the list of its ingredients.

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[2] ECJ, dec. of 3.9.2009, C-498/07, Gewerblicher Rechtsschutz und Urheberrecht International (GRUR Int.) 2010 – Aceites del Sur-Coosur, at para. 47; ECJ, dec. of 26.4.2007, C-412/05, GRUR Int. 2007, 718 – Alcon.

[3] ECJ, dec. of 4.4.2000, C-465/98, Juristische Schulung (JuS) 2000, 1214.

As to the second argument, the ECJ pointed out that it is widely understood that lead and cadmium are present in the natural environment as a result, in particular, of air pollution and pollution of the aquatic environment. Since garden fruit is grown in an environment of this kind, it is inevitably exposed to the pollutants present in it.

Lastly, the description 'naturally pure' appearing on the label might indeed be liable to mislead consumers if the foodstuff contained a high level of residues of toxic or polluting substances, even if they presented no risk to consumers' health. In that regard it was decisive that the lead and cadmium residues which were measured in d'arbo jam are present in it at levels well below the maximum values authorised by the legislation of the EU Member States as a whole, 50 times and 25 times (respectively) lower than the maximum values authorised by the German legislation. In those circumstances the term 'naturally pure' used on the label of the packaging of that foodstuff was not liable to mislead consumers as to its characteristics.

EMPIRICAL OR NORMATIVE STANDARD?

In German doctrine there has long been a discussion about whether the standard of the average consumer is supposed to be normative or empirical.[4] Conventional wisdom was that the standard formerly applied by the German Supreme Court (the uninformed consumer in need of strong protection) was supposed to be empirical because it resorted to percentages of consumers actually misled. In some sectors, like advertising for health goods or in the environmental context, 10-15% of consumers being misled was considered to be sufficient to establish a case of misleading advertising.

The European standard, on the other hand, was considered to be normative as it resorted to the model of an informed, reasonable consumer. However, upon closer look there was never an 'either-or' in terms of normative and empirical standards.[5] By definition, the standard of the average consumer has to be normative because it determines and specifies the legal standard to be applied in a specific case. This is relevant for both steps of first determining the relevant consumer understanding of the advertising and then determining the standard for legal evaluation.[6] A further question is how this standard is to be verified in a specific case. This appears to be an empirical question. However, empirical findings will mostly be avoided in practice by the dominant understanding that the presiding judge herself is in a position to determine what the relevant average consumer would think.[7] The ECJ always left open the question of how the national courts would apply the standards from an evidential point of view.[8]

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4 See *Ahrens*, Wettbewerb in Recht und Praxis (WRP) 2000, 812 (813); *Gloy*, Festschrift Erdmann, 2002, p. 811 et seqq.; *Ulbrich*, WRP 2005, 940; *Sack*, WRP 2004, 521 et seqq.; *Schweizer*, Gewerblicher Rechtsschutz und Urheberrecht (GRUR) 2000, 923; *Lettl*, GRUR Int. 2004, 85; *Omsels*, GRUR 2005, 548 et seqq.; *Seibt*, GRUR 2002, 465 et seq; *Lettl*, GRUR 2004, 449, 453 et seqq.

5 See *Ahrens*, WRP 2000, 812 (813); *Lederer*, Neue Juristische Online-Zeitschrift (NJOZ) 2011, 1833 (1835); *Schweizer*, GRUR 2000, 923.

6 See *Köhler*/Bornkamm, Commentary on Unfair Competition Act (UWG), Sec. 1 at para. 21.

7 See German Supreme Court (BGH), dec. of 29.3.2007, I ZR 122/04, WRP 2007, 1346 – Bundesdruckerei, at para. 36, stating that this is not a question of determining the facts but applying specific knowledge of experience.

8 See ECJ, dec. of 16.7.1998, C-210/96, GRUR Int. 1998, 795 – Gut Springenheide.

The conventional dispute between 'normative' and 'empirical' standards appears to be centered on the normative level in the sense of how strictly or liberally the standard should be framed. In this sense, resort to quotas in the former case law of the German Supreme Court was going one step towards empirical evidence, but the court still had to determine the relevant standard on a normative level. The objective of this analysis is to show that the normative standard should move closer again to empirical evidence about consumer behaviour and hence take into account again the need for protection of the consumer that undoubtedly still exists and in many ways has even increased in the past decades.[9]

No return to the general standard of the uneducated, inattentive and helpless consumer is advocated in this paper. It is acknowledged in the general discussion on consumer protection that the reasoning behind it is not that consumers are in an inferior position, rather that they do not have sufficient information to make an informed choice. By inference, this suggests that the consumer is not generally in need of strong protection. But a differentiated standard seems appropriate, referring to the differences in specific situations and including empirical evidence in this distinctive model. Basically, this is what has happened in case law in recent years.

The German Supreme Court for some time has been following a situational approach, resorting to different factors of 'attentiveness' of the consumer. For example, the purchasing situation and the value of the article would be of major importance in a consumer's decision to buy a product.[10] In addition, the Unfair Trade Practices Directive left the door open for introducing empirical elements by resorting to acknowledgement of social, cultural and linguistic factors in Recital 18. This differentiated approach has to be further developed. For example, in the context of the Internet, situations involving a lack of transparency have to be identified, calling for stronger protection of the consumer. The legal situation is comparable in all Member States of the EU and should be handled uniformly and autonomously.

AVERAGE CONSUMER STANDARD IN TRADEMARK LAW

Application of the standard of the average consumer is not confined to unfair competition law. It is also applied in adjacent areas of intellectual property law as well as in contract law. Resorting to the notion of a coherent legal system, these areas have to be taken into account.

Application of the European standard of the average consumer is well established in trademark law.[11] However, specificities of trademark law lead to some variations. The German Supreme Court quite early rejected the standard of the 'fugitive' consumer due to the availability of registration systems in trademark law.[12] In legal doctrine a 'mixture of normative standards on the one hand and single empirical evidence on the other' is observed to be present in European case law.[13] If no uniform understanding of the relevant public ('Verkehrsauffassung') could be found, the CJEU as well as national courts resorted to a 'not completely irrelevant part' of the

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9 See *Ulbrich*, WRP 2005, 940 (942), with a view to consumer research.

10 See BGH, dec. of 20.10.1999, I ZR 167/97, GRUR 2000, 619 – Orient-Teppichmuster; BGH, dec. of 13.3.2003, I ZR 212/00, GRUR 2003, 626 – Umgekehrte Versteigerung II.

11 See *Ingerl/Rohnke*, Commentary on Trademark Law (MarkenG), 3rd ed. 2010, Sec. 14 at para. 453 et seqq.

12 See BGH, dec. of 18.6.1998, I ZR 15/96, GRUR 1998, 942 – Alka Seltzer, at p. 943; BGH, dec. of 13.1.2000, I ZR 223/997, GRUR 2000, 506 – Attaché/Tisserand, at p. 508.

13 *Ingerl/Rohnke*, Sec. 14 et para. 457.

audience.[14] The relevance then was determined on the merits of the specific case relating to different normative criteria.

In trademark law doctrine, there was also some opposition to the application of the average consumer standard. One of the arguments was that trademark law, unlike unfair competition law, was not directed at consumer protection; its main objective was the protection of the trademark owner and his investment.[15] Trademark law was about protection of the individual that only benefitted the public indirectly. There is some truth in this and it may explain why there is the likelihood of confusion which is conceived to be an abstract standard whereas evidence of real confusion is only regarded as an indicator.[16] It is a legal requirement and its factors will be regarded as comprising a legal question in German case law, whereas the CJEU considers these to be factual questions.[17] However, in this context the same is true in unfair competition law. The factors to be included in the legal evaluation will be determined on a normative level whereas their presence will be – at least in part – an empirical question.

If one takes a closer look, the differences in the objectives between trademark law and unfair competition law are not as big as they appear. The protection of the trademark owner in the end will also depend on the consumer who is the object of his marketing efforts. Trademarks are part of market communication and the roles of producer and consumer are interrelated. Hence, there is a point to some commentators calling for a standard that includes all consumers and arguing against a purely normative average consumer without any resort to empirical factors.[18]

Specification of consumer standard

While the key point of this article is to redefine the average consumer standard and enrich it with empirical elements, the question remains how to do this. I would offer the following a concept of 'layered specification'.

Distinguishing consumer groups

The first step – before resorting to a situational differentiation - would be to distinguish different consumer groups. This distinction is grounded in the EU Unfair Commercial Practices Directive 2005/29/EC, Art 5(3), which focuses on special consumer groups where advertising is directed at these specific groups or, to be more precise, their interests affected by the advertising. In addition to the 'general' average consumer, the typical special needs of specific groups have to be taken into consideration. The most prominent case would be the protection of children and young people who are vulnerable and lack experience of business, while at the other send of the spectrum, businessmen will be more experienced and more knowledgeable than the average consumer.

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14 BGH, dec. of 19.11.1992, I ZR 254/90, GRUR 1993, 692 – Guldenburg, at p. 694; BGH, dec. of 23.1.2003, I ZR 171/00, GRUR 2003, 440 – Winnetou´s Rückkehr; ECJ, dec. of 26.4.2007, C-412/05, GRUR Int. 2007, 718 – Alcon – at para. 99.

15 *Seibt*, GRUR 2002, 465 (470).

16 See *Ingerl/Rohnke*, Sec. 14 at para 396 et seqq.

17 See BGH, dec. of 14.5.2009, I ZR 231/06, GRUR 2009, 1055 – airdsl, at para. 62; ECJ, dec. of 10.7.2009, C-416/08 – Apple Computer, at para. 32.

18 *Ingerl/Rohnke*, Sec. 14 at para. 461.

The main problem is a meaningful delineation of the specific groups. This problem becomes evident in light of the catalogue of criteria listed in the Directive. These include 'mental or physical infirmity, age or credulity'. The distinction is related to personal criteria and is based on 'clear identifiability' of the respective group. While this may be clear for children as well as blind or deaf people or illiterate or non-native language speakers, the distinction becomes obscure when it comes to sick people. The critical category appears to be the criteria of 'credulity' in Art 5(3) of the Directive. This criterion appears to be too general to apply beyond clearly identifiable groups, like children.

Elements of the consumer model

In a second step, different elements of the consumer model can be distinguished that are open to empirical enrichment to a different degree. These elements include the knowledge of the consumer ('level of information'), the intensity of attention ('attentiveness'), as well as the intellectual capacities and processing of the information ('reasonableness').

Situation related attentiveness

As far as attention is concerned, this criteria is related particularly to the purchasing situation. At this point, the economic research gives us some hints based on empirical evidence. For example, it distinguishes 'experience' goods from 'search' goods and 'trustworthy' goods. Purchasing of these different types of goods usually requires different levels of attention and care.[19] This distinction has also been acknowledged in the case law of the German Supreme Court.[20] With respect to the degree of attentiveness another factor to be considered is the sensitivity of the consumer in respect to the areas addressed in the advertising, like health and environment.

These distinctions can be traced to information asymmetries that can be verified empirically. The effects of these asymmetries are more severe the more important the respective information is for the purchasing decision. On the normative side, these asymmetries have resulted in the assumption of enhanced information duties on the side of the producer, especially in contract law. In relation to the consumer model this notion plays out in the element of reasonableness, but also in the second evaluation phase to establish a finding of likelihood of confusion that can also be identified in Art 7(1) of the UCP Directive, where misleading advertising is assumed where 'material' information is not given by the producer.

Beyond that, the level of attentiveness may be differentiated with respect to use of different media. In this context special attention may also be given to an Internet 'situation'.

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19 See *Lettl*, GRUR 2004, 449 (454). As to trademark law see *Ingerl/Rohnke*, Sec. 14 at para. 463 et seqq. with further references to case law.

20 BGH, dec. of 20.10.1999, I ZR 167/97, GRUR 2000, 619 – Orient-Teppichmuster, at p. 621; BGH, dec. of 13.3.2003, I ZR 212/00, GRUR 2003, 626 – Umgekehrte Versteigerung II, at p. 627. See further ECJ, dec. of 22.6.1999, C-342/97, GRUR Int. 1999, 734 – Lloyd/Loints; ECJ, dec. of 20.3.2003, C-291/00, GRUR 2003, 422 – Arthur/Arthur et Félicie.

Average knowledge

The second element of the consumer model relates to the level of knowledge to take into account, ('normally informed'). This is partly dependent on the specific group where experts can be assumed to have a higher level of specific knowledge than groups with little business experience. In addition, it relates to the products offered.[21] Again, there is a strong empirical side to this. One relevant factor is the knowledge that will be acquired by the average consumer in everyday life at school, through use of media etc.[22] Compared to the situation 40 years ago it seems that the level of knowledge has considerably increased through improved school education and enhanced media use in general. No special legal expertise or expert knowledge will be assumed. The same is true in relation to special knowledge about markets.[23] The starting point would be the 'normal language understanding'.[24] This can be established by a poll taken among the relevant public.

What will all of this mean for the labelling 'naturally pure' in our introductory case? Will designations of 'pureness' be understood in a way that the respective product will be free of any residual substances, or is the average consumer aware that in light of the general pollution of the environment any product that may be produced under the highest biological standards will display minimal residues of pesticides, even if below the level permitted by law?

Reasonable understanding

The third element of the consumer model is the closest to being normative and may be used for a normative fine tuning. How would the average consumer evaluate the respective information? To what extent can he/she critically question the information? For our example, even if the consumer knows about general pollution, would he/she rely on the product designation in the sense that the producer may have used special procedures to free the product from any contamination? Or is the consumer expected to think and also to gather information that may result in the conclusion that such procedures do not exist, would be too costly, etc?

The questions raised now show quite clearly that this element of the consumer model is most akin to a weighing of interests and a distribution of risk that can be regarded as relating to the principle of proportionality established in European law. The main function of this element would be that of a normative corrective measure to the empirical enrichment of the other elements of the consumer model. Considering the function of the consumer model, this corrective instrument seems to be inevitable.[25] The critique in this article is directed at the extent to which case law has extended information requirements on the side of the consumer.

Within this element a distribution of information risks or information duties has to be pursued. Looking at this it has to be taken into account that it is the producer who not only puts the product on the market but also initiates the market communication and uses the communication

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21 *Köhler*/Bornkamm, Sec. 1 at para. 34; *Helm*, Festschrift Tilmann, 135 (142).
22 *Lettl*, GRUR 2004, 449 (454); *Pfeiffer*, NJW 2011, 1 (6): "normal everyday knowledge".
23 See BGH, dec. of 28.6.2006, XII ZR 50/04, NJW 2006, 2618.
24 *Pfeiffer*, Neue Juristische Wochenschrift (NJW) 2011, 1 (6).
25 As to the role of the consumer in the market process see *Scherer*, WRP 2013, 705 (709).

channel to transfer his message. He has control of the channel and reaps the benefits. The costs of information acquisition are less on the producers´ side than on the consumers´ side.[26]

From the perspective of European law, another aspect has to be taken into account. In Art 1 of the UCP Directive as well as in Art 169 of the EU Treaty, a high level of consumer protection is desired. The consequence should be that no overly burdensome requirements will put on the consumer. The fact that the internal market of the EU is also beneficial to the consumer is not in itself an argument to force consumers to change their habits and adapt to the producer side. Their side is also profiting from the internal market to a considerable degree.

Coming back to our sample case of 'naturally pure' jam the question would arise from the perspective of an empirically enriched consumer model if empirical use of this designation has the potential to imply a false impression on the consumer. The process of normative correction within the third element of the consumer model then includes the question whether the findings within the first two elements have to be corrected in light of an appropriate distribution of risk with a view to the goal of a high level of consumer protection. Again, situational factors may lead to a differentiation. How much extra information effort is required from the consumer in the specific situation? How high is the demand for additional information, especially with 'search' and 'trust' goods? Who is more able to carry those costs and who is the cheapest cost avoider? Beyond a reference to traditional economic analysis, behavioural economics have to come into play. An important notion is the limited capacity of consumers to process information.[27]

The first two levels of knowledge and attentiveness rests on the question of whether the information about product ingredients on the product label is comprehensible and will be brought to the attention of the consumer in the specific purchasing situation. Starting from this point, the demand for additional information has to be verified. The consumer buying a bottle of beer who is interested in the origin may well be required to look at the back of the label where this information may be readily available.[28] On the other hand, information on critical ingredients may be hidden in the small print or behind incomprehensible expert language, thus establishing a fiction of consumer information that is not warranted on an empirical level.

A normative correction of empirical evidence to the disadvantage of the consumer will not usually be warranted due to the interest of market competition. On a normative level, the consumer may be required to make greater effort with respect to high value goods than for goods in everyday life. This is in line with empirical findings. Somebody who buys a car without any information effort or market review has to take the disadvantages arising from this approach on the grounds that he/she didn´t use the level of care that a consumer as a market participant should exercise.

The level of consumer protection to be applied may be enhanced with respect to goods that relate to areas of special sensitivity acknowledged by law, like the environment and health. The same would be true in areas where the legislator acknowledges a special level of consumer

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26 See *Lettl* GRUR 2004, 449 (456).

27 See *Zamir/Teichman*, The Oxford Handbook of Behavioral Economics and the Law, 2014, p. 465 et seqq.; *Gerrit de Geest*, Contract Law and Economics, 2011, p. 401 et seqq.; *Wagner,* The Common Frame of Reference: A View from Law & Economics, 2009, p. 200 et seqq.; *Eidenmüller*, JZ 2011, 814 (816 et seq).

28 BGH, dec. of 19.9.2001, I ZR 54/96, GRUR 2002, 160 – Warsteiner III, at p. 162.

protection by establishing special information duties on the side of the producer. In this instance, the legislator may choose to put a special burden of information on the producer.

GEOGRAPHICAL INDICATIONS BETWEEN UNFAIR COMPETITION AND TRADEMARK LAW

Geographical indications are different from trademarks. They are not designed to protect the individual owner but the 'collective goodwill'[29]. A major difference is that there is no single owner who has control. The right to use is not dependent on any contract but purely factual. It relates to the origin of the product as well as the understanding of the relevant public. In this sense it is systematically an unfair competition scheme which is alien to its location in the trademark laws, for example; Section 126 et seq. of the German Trademark Act. However, the remedies provided stem from trademark law (see, eg § 128 German Trademark Act). Moreover, in some cases geographical indications are so clearly defined that a specific mark is protected with respect to specific products. In these cases, the protection resembles trademark law and is also independent from any likelihood of confusion, eg Art 13(1)(b) EU Regulation 510/2006 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs. In addition, registration as individual or collective marks is not precluded.

It is outside the scope of this article to delve into detail about the different schemes for the protection of designation of origin and geographical indications. From an international perspective, the different European protection measures in this respect are disputed and under fire; the same applies in the context of TTIP negotiations taking place between the EU and the US. Instead, I will like to focus on the consumer model in this context with a view to changes that would occur upon any disposal of the European protection schemes.

The average consumer standard is involved at different stages in the protection of geographical designations. The first step would be to determine whether a geographical designation is present. The standard for this is the average informed, attentive and reasonable consumer. The second step would be the delineation of the area of protection where again the consumer model is employed. Another question for the consumer model would be which element is determinative in cases where the product consists of several components produced at different locations.

Again, of course, a major area of application for the consumer model is the likelihood of confusion (§ 127 German Trademark Act; Art. 13 Regulation 510/2006). Here, the standards from unfair competition law are applied. However, there is a discussion as to whether the minimum threshold which applies in unfair competition should be abandoned in the protection of designations of origins due to the notion that the latter are aimed at the protection of competitors similar to trademark law. However, the notion of a more abstract standard in this field are even more remote as the designation of origin is a scheme closer to unfair competition than to trademark law.

One exception should be mentioned. In cases where protection is mandated normatively through a specific scheme, (eg Regulation 590/1999 or Regulation 510/2006), protection will continue regardless of any empirical evidence to the contrary or a difference in understanding of the

[29] See BGH, dec. of 10.8.2000, I ZR 126/98, GRUR 2001, 73 – Stich den Buben, at p. 77.

average consumer. This is more a notion of the coherency of the legal system that cannot provide a specific protection with the right hand and take it away again with the left hand.

On the other hand, within the scope of its application, EU Regulation 510/2006 preempts any protection under national law. The pre-emptive effect extends to those designations where no application under the Regulation was in fact made but could have been made.[30] National law may thus only be used if there is no relation of any kind between geographical origin and a specific quality or characteristics of a product.

The protection provided by Art 13 of the Regulation is quite wide. It is mostly independent of any likelihood of confusion and only refers to this in Art 13(1)(c) which is, however, only the last resort and of minor practical relevance. Hence, if the protection under this Regulation should ever be abolished the protection under trademark or unfair competition scheme will be less strict and in line with general unfair competition law.

CONCLUSION

As to the rules of misleading advertising, the standard of the average consumer is the central notion in determining the legally relevant understanding of an advertising measure as well as the standard of evaluation. This is not only true for the general prohibition on misleading advertising but also with respect to specific provisions in special instruments, especially in food law.

Unfair competition law in Europe has gone through twenty years of turbulence. The ECJ had a big impact on harmonisation through the definition of a common standard of the average consumer that was consequently introduced into secondary EU law. The Unfair Commercial Practices Directive did the rest. For German law, this has resulted in a considerable liberalisation of unfair competition law. However, the need for consumer protection has not decreased. To the contrary, the Internet as a new medium has created many new ways to mislead the consumer.

Consumer protection refinement of the rules on misleading advertising have increasingly to take into account empirical elements, especially within the model of the average consumer. Reference may be made to consumer surveys. This is especially true with respect to the first two elements, the knowledge and attentiveness of the consumer. As to the consumer's reasonableness, the focus should be on the need for protection in special situations.

Looking at the problems the information model of consumer protection has created,[31] the European principle to replace regulatory prohibitions by information has to be revisited in a critical way. A good example for this review is the 'button' solution in Art 8(2) of the Directive 2011/83/EC on Consumer Rights in force as of June 13, 2014 against fraud on the Internet where the legislator resorted to the measure of invalidating any resulting contract as a stronger instrument than the failure of the trader to provide sufficient information. Increased dangers to the consumer have to be dealt with especially in the context of new media. The call to emphasize consumer interests while supporting the functioning of the free market may be in the best interests of all market participants.

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30 ECJ, dec. of 8.9.2009, C-478/07, GRUR 2010, 143 – Budejovický Budvar.

31 See *Eidenmüller*, JZ 2011, 814 (816 et seq.); *Kind*, Die Grenzen des Verbraucherschutzes durch Information, 1998; *Drexl*, Die wirtschaftliche Selbstbestimmung des Verbrauchers, 1998, p. 414 et seq.; for elelectronic communications *Wiebe*, Die elektronische Willenserklärung, 2003, p. 409 et seqq.