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Legal and cultural issues
in the advertising and marketing
of consumer products - East meets West

The Benetton Campaign

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1. Introduction

A couple of years ago the Italian apparel and textile producer Benetton, the „Pullover Company“, flooded Europe and parts of the United States and Japan with an advertising campaign that was widely believed to mark the beginning of a new era of advertising.

The campaign led to an intensive public debate in many European countries and the United States and also to legal action against Benetton in courts and in front of self-regulatory bodies and to a still ongoing debate in jurisprudence.

In the following I would like to describe the campaign as well as the legal debate and general discussion it initiated.

2. The Facts

Oliviero Toscani, an Italian photo reporter, created the campaign. It was put into action mainly in Western Europe but also in the United States and in Japan. The campaign used print ads and posters as advertising media.

The most well-known motifs were:

- Dying AIDS patient
- Priest kissing nun
- T-shirt of Bosnian soldier
- Container with refugees
- Military cemetery with Star of David
- Ship with refugees
- H.I.V. positive
- Gunman with bone
- Oil-polluted duck
- Child labor

Before we come to a legal qualification of these pictures, let us collect the facts:

From a marketing and advertising point of view, what do all these motifs have in common?

- They are part of an image campaign for the Benetton company;
- they are not related to a product produced or marketed by Benetton;
- they do not contain any request to buy a Benetton product;
- the only wording they contain is the slogan and firm name „United Colors of Benetton“;
- they use subjects of recent political events;
- they show religious manifestations
- they address severe social and environmental problems
- they use erotica

To go into more detail:

The motif "Dying AIDS patient" addresses the serious problems of the AIDS disease and the pain as well as the grief this disease entails. It is legally important that Benetton had the consent of the parents of David Kirby – the dying AIDS patient – for the publication of the picture. Oliviero Toscani did not take the picture for the purposes of the Benetton campaign. The "H.I.V.-positive"-motif appeals to the prejudice of people against others that carry the burden of an abnormality – such persons become "branded" by society.

The motifs "Container with refugees" and "Ship with refugees" address war and political upheavals taking place in developing and third world countries.

The motifs "Gunman with bone" and "T-shirt of Bosnian soldier" address the genocides, which took place in Africa and Bosnia.

The motifs "Priest kisses nun" and "Military cemetery" use religious forms and affect religious feelings.

The motif "Oil-polluted duck" concerns the problems of environment pollution and big environmental catastrophes.

The motif "Child labor" alludes to a social and economic problem of developing countries.

Some of the subjects are simple erotic.

One might think that the liberal European societies accepted the campaign as a new style of advertising, but this was not the case. The press, so-called intellectual opinion leaders and some social pressure groups opposed and criticized it strongly. As already said, some of the motifs were challenged and qualified as illegal. Some of the motifs were press photos taken by other reporters under circumstances not related to the Benetton campaign. Oliviero Toscani created some of them only for purposes of the campaign.

Oliviero Toscani explained, justified and defended the campaign in his book "La pub est une charogne qui nous sourit" ("Advertising is a smiling carrion"). He accused traditional advertising, in particular so-called "life-style-advertising", of being dull and unimaginative, creating and portraying an ideal world that does not exist. According to Oliviero Toscani, this type of advertising has lost the ability to communicate with the consumer. He pleads for a Nuremberg trial against this type of advertising. He argues that this style of advertising has its intellectual origin in the political propaganda of National Socialism and Communism in the thirties of our century.

In Germany, the motifs "Dying AIDS patient", "Gunman with bone" (both Landgericht Frankfurt, WRP 1992, 429), "Container with refugees" (Oberlandesgericht Frankfurt, GRUR 1993, 130), "H.I.V. positive" (BGH, 6.7.1995, GRUR 1995, 600), "Oil-polluted duck" (BGH, 6.7.1995, GRUR 1995, 598) and "Child labor" (BGH, 6.7.1995, GRUR 1995, 595) were declared illegal.

In Italy, the motifs "Priest kissing nun", "Military cemetery with Star of David" and "Newborn child" were found to be illegal (Giuriprudenza autodisciplinare, Vol.IV, 1991, 306, 454, 458).

In the Netherlands, "Dying AIDS patient" was found to be illegal (Code Commissie 26.5.1992, IER 1992, 145).

In Finland, "T-shirt of Bosnian soldier" was challenged, but the complaint was dismissed (GRUR Int. 1996, 251).

Contrary to the Finish decision, "T-shirt of Bosnian soldier" was found to be illegal in Norway (GRUR Int. 1996, 256).

3. The criticism

The public and legal critiques against the Benetton campaign were that it is not „issue-related“, that means that the statements made in the different subjects - if there are statements at all - have no connection with the products of the or with the company; there is no connection between advertising motif and advertised object. It was argued that this style of advertising is trying by "shocking" the spectator and the public with either embarrassing or frightening pictures - some of them taken out of reality, others created for the campaign - to get the attention of the public and to keep the name "Benetton" in people's minds.

It was also argued, that the campaign exploits the grief and pain of people, that it intrudes into the private sphere of people and breaks taboos.

In France for example, an AIDS-patient published a print ad showing his face with the subtitle: "Pendant l'agonie, la vente continue" ("During the death struggle, the sale continues").

According to a public opinion poll in The Netherlands, 75 % of the people interviewed qualified the campaign as "bad or very bad".

The campaign was also accused of infringing religious feelings and promoting racism.

4. The legal situation in Europe

The German Law Against Unfair Competition (UWG) contains in its section one a so-called general clause according to which "competitive practices contra bonos mores" are illegal. In Austria, we have a similar law with an identical provision. Some European countries have similar laws protecting fair trade practices and fair competition, like Belgium, Luxembourg, Spain, Portugal, Greece or Switzerland, and the Scandinavian countries Denmark, Sweden, Norway and Finland; others have similar provisions in their respective Civil Codes, like The Netherlands, France and Italy. The legal situation in Great Britain and Ireland is fundamentally different from continental Europe: Legal remedies against unfair competition were developed on the basis of the Common Law system. In some European countries, additional regulations enforced by self-regulatory bodies exist.

The European Union has now initiated efforts to harmonize the laws of its member states in the field of unfair competition. But the Council Directive of September 10, 1984 about the approximation of the laws, regulations and administrative provisions of the Member States

concerning misleading advertising (84/450/EEC) is the only result of these efforts. Only four weeks ago, said directive was amended by the Directive 97/55/EC of European Parliament and of the Council of 6 October 1997 to include comparative advertising.

5. What the courts said

In the following analysis, I focus mainly on the German decisions, because in Germany the campaign provoked the strongest legal objections. Some of the decisions are from the German Supreme Court (BGH), and they led to an intensive legal debate in the literature.

We are talking today about the advertising and marketing of consumer products. There is no doubt that a pullover is a consumer product. But do we see any pullover in the motifs I have shown? - No! Consequently the legal question was asked whether the campaign is advertising that should be considered under competition law at all, since there is no obvious connection between the advertising statements and the products Benetton is marketing and selling. The answer of the German Supreme Court was that also pure „image-advertising“ with the only purpose to promote the name of the advertising enterprise are acts of competition governed by section one of the Law Against Unfair Competition.

The court stated that the fact that the motifs used do not refer to Benetton products is not per se an infringement of the principle of “competition in performance” (“Leistungswettbewerb”) protected by the law. “Competition in performance” means the postulate that an enterprise shall primarily promote the performance of its products and the achievements of its own.

In another decision, not related to the Benetton campaign, the German Supreme Court has stated that section one UWG does not allow the courts any kind of censorship in good taste (BGH, GRUR 1995, S 592, 594). Therefore a tasteless promotion is not illegal. Also the fact, that a promotion uses sexual motifs does not make it illegal per se. Only advertising that is “contra bonos mores” is illegal.

The problem is how to determine what is “contra bonos mores”. There is no doubt that ethics in many parts of Western European societies have changed over the last decades. However - at least in Germany - it was always argued in jurisprudence and still is in the debate about the Benetton campaign - that the reference to the “bonos mores” in section one UWG is not a reference to the actual standard of moral beliefs in society but that it sets a standard of morals or sets the boundaries within which competition shall take place. “Boni mores” are determined by how one should act and not by how a majority acts (Baumbach/Hefermehl, Commentary to the Law Against Unfair Competition, 18th edition, Introduction, Rdn 66). This position reflects the thinking of Immanuel Kant; this is a kind of a categorical imperative in competition law. The German Supreme Court also adopts these principles for the solution of a procedural question in these cases. In the “H.I.V. positive” proceedings, the Supreme Court rejected for this reason a motion of Benetton for the taking of evidence that the “sense of decency” was not hurt by the advertising statement in question.

The main reason why parts of the campaign were qualified as illegal was that with the motifs used, Benetton arouses the sentiment and the compassion of the public for the problems shown, implying that either Benetton is also affected by these problems, or that it is an

exploitation of an emerging solidarity of the public with Benetton for Benetton's own commercial benefits.

In the courts and also by the press Benetton was accused of having a "cynical attitude" by exploiting the misery and poverty shown in the campaign.

In the case of "H.I.V.-positive", it was additionally argued that it violates human dignity.

The fact that Benetton had the consent of David Kirby's parents for the publication of the picture and that David Kirby's father said in a press conference in New York that it was the will of his deceased son to inform the public about this terrible disease was neither taken into consideration by the courts nor by the legal and public debate.

A further interesting legal argument against Benetton was that the campaign produces a highly emotional aversion to advertising in general and therefore narrows the possibilities of other vendors to reach the consumers with their advertising. According to the courts, the campaign also forces competitors of Benetton to imitate the style of the campaign.

Another problem discussed in connection with the series of Benetton proceedings in Germany was whether a prohibition of some of the motifs used infringes the freedom of speech granted as a constitutional right by the German constitution. An argument against this approach could be the question whether there was a statement at all, because the Benetton campaign only used pictures. The only verbal statement on the posters and print ads was the slogan "United Colors of Benetton". But it is agreed in German jurisprudence that photographs and pictures are one form of the expression of one's opinion.

The answer to the principal question was negative in the sense that there is no infringement of constitutional rights. The German Supreme Court argued that advertising statements with the purpose to increase the standing of an enterprise deserve less protection than other statements. It is said that immaterial positions should not be linked with an economic return. However, it is important to note that the German Supreme Court - in conformity with the U.S. Supreme Court and the European Court of Human Rights - includes commercial advertising in the scope of protection of the freedom of speech.

6. What was said in defense

Although Benetton experienced a more or less total defeat with its campaign in German courts, not all legal authors followed the argumentation of the courts.

It was pointed out that the Benetton campaign is in no aspect misleading. It also does not contain a request to buy a product. For a consumer who does not already know who Benetton is and what kind of products this company sells, it will be difficult to identify the initiator of the campaign. Also it was asked why advertising appealing to the emotions of consumers by pictures of an ideal world - everlasting youth, beauty, happiness, wealth, erotic attraction, etc - is admissible and why it should be illegal to confront the consumer with the shocking reality.

7. Conclusion

Although it is commonly believed that European societies are the most liberal in the world advertising measures, which go beyond traditional advertising statements, are not accepted, neither by the majority of the so-called opinion leaders nor in the courts. What the public really thought about the campaign is very difficult to evaluate.

I believe that in other cultures like in Islamic, African or Asian countries the judgement about the campaign would have been the same, only supported by another reasoning.

The final result is that after the campaign, the trade name Benetton is among the five best-recognized trademarks of the world.

8. Literature

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