The Conseil Supérieur de l'Audiovisuel (Audiovisual High Committee), which is the independent administrative body in charge of regulating the audiovisual field of activity and especially of granting TV broadcasting licenses, released a report on sport and television in October 1992. The report focused on the TV broadcasting of the year's major sports events: the Winter Olympic Games and the European Nations Football Cup. The CSA subsequently drafted an ethics code purportedly to match the public TV viewers' right to information with the exercise of broadcaster's rights in sporting events.

The Law of 13 July 1992 endorsed the main rules established in the CSA's ethics code. It therefore sets out the following principles:

(1) The right to exploit a sport event belongs to the person who organised the event (under the Law of 1984, there is only one sport federation, for each sporting discipline, which is entrusted by the Minister of Sport with the organisation of sport competitions). The owner of the right may not deprive sportsmen or sportswomen of their freedom of expression, and they may subsequently answer questions asked by journalists.
(2) The primary broadcaster may not oppose the broadcasting by another broadcaster, in a subsequent TV news report or sports magazine, of short excerpts from the broadcast event. The broadcast of these excerpts must clearly identify the primary broadcaster owning the right to exploit the sporting event.
(3) Agreements conveying exclusive rights of audiovisual exploitation of sports events may not exceed five years.
(4) Both the person organising the sports event and the primary broadcaster must provide free access to sports premises for the staff of other broadcasters or of newspapers willing to produce a report to be subsequently broadcast in the regional area where the sports event is to take place.

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As a practical result, TF1 and Canal Plus, among others, will have to relinquish some exclusive rights which they presently own.

Germany

ADVERTISING
Act on advertising in the Public Health Sector

Federal Supreme Court
17 June 1992
I ZR 177/90

Section 1 of the German Act on Advertising in the Public Health Sector indicates the scope of application of the Act by stating that it is applicable to advertising for drugs and other medical treatments. Section 10(1) provides: 'Advertising for drugs available only on prescription is permissible only on the premises of doctors, dentists, veterinary practitioners, pharmacists and persons who lawfully trade with these drugs'.

Facts: The plaintiff and the defendant were the leading manufacturers of contraceptive drugs in Germany. In May 1987 the defendant introduced a new contraceptive drug, 'Femovan', and started a campaign by placing inserts in journals for girls and women. The inserts contained advice for girls on contraception, without, however, mentioning the name of the drug 'Femovan'. The headline of a typical insert ran: 'Everybody knows how it begins – but then?' The insert explained that many young girls encounter problems in the case of an accidental pregnancy and recommended obtaining precautionary advice from a gynaecologist. The insert ended: 'We support gynaecologists by developing new and compatible drugs. For the sake of your body.' Other inserts were similar in style, for example, the slogan, 'What do you mean by holiday preparations?'

The plaintiff asserted that the inserts contravened the prohibition on advertising drugs available only on prescription pursuant to section 10 (1) of the Act on Advertising in the Public Health Sector, submitting that the reader of the inserts would be inclined to assume that the defendant advertised its product 'Femovan' even though the inserts did not mention the drug. The plaintiff filed a suit for an order to restrain the defendant from continuing the disputed campaign, for discovery and damages. The defendant objected that it did not advertise a specific drug, but that the inserts constituted a permissible information campaign which did not fall within the prohibition of the Act on Advertising in the Public Health Sector.

The Munich District Court decided in favour of the plaintiff. The Munich Court of Appeal rejected the defendant's appeal. The defendant appealed to the Federal Supreme Court which reversed the judgment of the Court of Appeal.

Held: The Federal Supreme Court held:

(1) Even if inserts do not mention a particular drug, there is indirect advertising in contravention of sections 1 and 10(1) of the Act on Advertising in the Public Health Sector, where the inserts stimulate the sale of certain drugs in a manner that the addressed public may, from additional circumstances, for example by reference to the field of indication, or from its knowledge of market conditions, infer from the insert that certain individual or several drugs are being promoted.

(2) The assumption that an insert advertises certain drugs available only on prescription is ill founded, if, upon the basis of a statistical survey, only a few interviewed persons understand the insert in that sense.

(3) An advertisement is not prohibited in the sense of section 10(1) of the Act on Advertising in the Public Health Sector, if the addressed public does not associate a certain product with the advertisement but different interchangeable products of one or different manufacturers. The prohibition contained in section 10(1) of the Act relates solely to product advertising and not to public relations or commercial image advertising, even though the latter may indirectly be capable of boosting the sales of the manufacturers' products.

(4) It depends upon the circumstances whether the addressed public deduces from an insert that it advertises a certain drug, even though the insert does not mention the drug. Conclusions may be drawn from the arrangement of the insert, from the context in which it is placed, from the name of the manufacturer, and from the content of the insert, such as for example the description of the field of medical indication. Thus, it must be considered whether the increase in sales of a contraceptive constitutes the main purpose of the insert and forms its priority, or whether, according to its appearance, the insert amounts to commercial image advertising or contains general information on the necessity of advice and sexual education.

Comment: The judgment of the Federal Supreme Court clarifies an important issue: the delimitation between permissible public relations or commercial image advertising and non-permissible product advertising for drugs available only on prescription. In a previous judgment, *Novodigal/Temagin,*[1] the Federal Supreme Court established that, according to section 10(1) of the Act on Advertising in the Public Health Sector, it is prohibited to mention a drug in an insert for public relations reasons of an enterprise, if the reference to the drug will be understood as product advertising. According to the latest decision, it is not even necessary that the drug be mentioned – it is sufficient that the addressed public comprehends the insert as promoting a certain drug.

The test to be used for the verification of the addressed public's state of mind is objective: the judgment refers to statistical surveys upon the results of which the court based its conclusion that the number of interviewed persons who understood the insert, in the sense of product advertising, had been insufficient. However, the judgment does not indicate where the borderline may be found between a negligible and a considerable segment of the addressed public, which regards the insert as advertising a drug.

There is no advertising in the sense of the Act on Advertising in the Public Health Sector, where an enterprise presents its achievements to the public. An insert may even contain the name of the product, however, only on the condition that the addressed public does not understand the insert as product advertising. In the view of the Federal Supreme Court, all the circumstances which may lead the addressed public to think that an insert contains product advertising will be taken into consideration. The potential for the pharmaceutical industry to present its achievements in inserts to the public are this limited.

1 17 February 1983, 1983 GRUR 393.

Arnold Vahrenwald
Rechtsanwalt
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Hungary

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Over-extensive quotation – whether 'free use'

Supreme Court of Hungary
Pt. IV. 20. 841/1991

Facts: An American magazine (the plaintiff) published a fairly long article in its issue of November 1990 with the headline: 'Kasparov speaking not only of chess . . .' A Hungarian weekly (the defendant) carried in its *Digest* column the Hungarian version of this interview, shortened approximately by half, with stylistic modifications due to translation, but keeping to the original content. The plaintiff in its action against the defendant asked the court to state that violation of its lawful rights had been committed, further that the Hungarian weekly and two Hungarian daily papers should inform Hungarian readers that the Hungarian version was an abbreviation to half of the article which can be read in full in English in the American magazine.