

Germany

BROADCASTING
Unfair competition
Spot-stop device

LT Advertising; Broadcasting;
Germany; Television; Unfair
competition

Federal Supreme Court

June 24, 2004

I ZR 26/02

Facts: The plaintiff, a privately organised German broadcasting organisation, brought an action against the producer of a device by means of which a user, who has to connect the device with a television set and programme it, may stop television advertising spots. The plaintiff argued that the defendant acted unfairly in the trade, because he allegedly disturbed the plaintiff's lawful marketing activities in the sense of Art.3 (formerly Art.1) of the German Act Against Unfair Trade Practices. This provision is a general clause, prohibiting unfair conduct in the trade.

The broadcaster argued that his activities were based on the constitutional freedom of broadcasting, Art.5(1), sentence 2 of the German Basic Law, and that his income depended essentially on the sale of advertising time so that the defendant's activities seriously endangered the economic basis of the broadcaster's existence. The defendant argued that there was no situation of competition between the parties so that his conduct did not fall within the scope of activities prohibited by the Act, and he asserted that the freedom of broadcasting was directed against measures taken by the state, but not by private initiative and that the plaintiff's income was not protected by the law.

Held: The Federal Supreme Court accepted that there was a situation of competition between parties who addressed their marketing activities concerning goods or services to the same circle of end users, provided that the activities of one party could impede the sales of the other. Even though the parties did not market identical or similar goods or services, they competed for the same customers—television viewers. But in the Court's view there was no unfair activity. An unfair impediment of the broadcasters' activities would have required an obstruction of his economic activities in competition. Such an obstruction may concern the sale, purchase, advertising, production, financing, or staff. Additionally, the assumption of a reprehensible obstruction requires particularly unfair means, which, upon the evaluation of the individual circumstances, could not be made out. The defendant did not interfere directly with the plaintiff's programmes. The use of the spot-stop device depended exclusively on the viewer.

An unfair indirect interference could not be assumed, because the defendant's activities did not stop the plaintiff from marketing his services. Only if the defendant would have used means, which were external to a competing activity, for example by a destruction or concealment, could this conduct have been unfair. The defendant also did not violate the plaintiff's freedom of broadcasting. The institutional guarantee of broadcasting by the constitution does not guarantee a broadcaster's right to undisturbed economic activity, insofar as the defendant was exercising his right of free economic activity based on Art.12 of the German Basic Law.