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„Green“ Advertising – a Swiss Perspective

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Overview

- General Principles
- Unfair Competition Law
- Specific Legislation
- Eco-Labels
- Sanctions
- Enforcement
- Self-Regulation
- Case Studies
- Conclusion

General Principles



- Use of “green” or environmental claims in advertising may be incorrect or misleading and thus constitute an act of unfair competition
- Very few specific legislation
- Enforcement by competitors, consumers and consumer organizations

Unfair Competition

- Swiss Federal Law on Unfair Competition (UCL)
- Definition of unfair competition:
 - **Art. 2 UCL:**

Unfair and illegal is every behaviour or business practice that deceptive or that in any other way infringes the principle of good faith and which affects the relationship between competitors or between suppliers and customers.
 - **Art. 10bis Paris Convention for the Protection of IP:**
 - (2) Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition.
 - (3) The following in particular shall be prohibited:
 - (i) all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor;
 - (ii) false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor;
 - (iii) **indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.**

Unfair Competition

- Unfair Competition in Advertising:
 - Art. 3 lit. b UCL:
Shall be deemed to have committed an act of unfair competition who makes incorrect or misleading statements in respect of himself, his undertaking, his goods, his services, his prices.
 - Art. 3 lit. I UCL:
 - Shall be deemed to have committed an act of unfair competition who misleads the customers by obscuring the quality, quantity, purpose, utility or danger of goods, works or services.



Admissibility of „Green Advertising“ is examined in the light of this very general and abstract norms.

Unfair Competition

- Act of unfair competition if claim is deceptive with regard to:
 - the nature of a product;
 - the composition of a product;
 - the attributes of a product;
 - the quality of a product.
- Problematic: claims that contain references to self-evident statements (ex. „this water does not contain any genetically modified organisms“)
- Unproblematic: claims that contain statements that are clearly subjective cannot lead to unfair competition (ex. „Der natürlichste Schluck der Welt“ for applejuice)

Specific Legislation

- Only very few specific rules have been integrated into different statutes and regulate partial aspects of „green“ advertising:
 - Environmental law
 - Organic Farming laws (marketing companies have to gather and present evidence of origin and production certificates for organic products)

Eco-Labels

- Not regulated by law
- Switzerland does not participate officially to the EU eco-label award scheme (Council Regulation 880/92)
- Labels are registered as trademarks by private institutions
- Distribution of licences for the use of the label
- No minimum statutory requirements for eco labels
- Little transparency regarding differences between various labels
- If used unlawfully by an advertiser:
 - Act of unfair competition
 - Act against licence (if licence has been granted)
 - Trademark infringement



warum
das Wasser
sich uns
heilig ist.

Nein, wir wollen Sie jetzt nicht belehren. Vielmehr für unser Eco-Label begeistern. Das blaue Qualitätszeichen der Migros kennzeichnet und wahrt seit 10 Jahren die ökologische Produktion von Kleidern und Heimtextilien. Das heisst, dass bei der Faserproduktion, beim Spinnen, Weben, Drucken, Färben sowie Ausrüsten umweltverträgliche Stoffe eingesetzt und die natürlichen Ressourcen Wasser und Luft geschont werden. Beispielsweise wird aus Rücksicht auf die Gewässer auf Chlorbleiche verzichtet. Damit auch in Zukunft die Eco-Richtlinien eingehalten werden, überprüft die Migros zusammen mit dem unabhängigen Institut gsm, Global Sustainable Management GmbH in Köln weltweit jeden Arbeitsschritt der Produktion. So tragen rund 70% aller Kleider und Heimtextilien der Migros das blaue Eco-Label – vom Kinderpyjama bis zum Strandtuch.



**TATEN
STATT
WORTE.**

MIGROS

300 00000 000

Sortenvielfalt - mit Orientierungshilfe!

Bio-Äpfel werden bei Coop in aussergewöhnlicher Sorten- und Geschmacksvielfalt angeboten. Neben den gängigen Konsumsorten wie Golden Delicious, Gala oder Malgold finden Sie im Bio-Fruchtregal immer häufiger neue Namen wie z.B. Topaz, Rubinola oder Ariwa.

Keine Angst vor neuen Sorten!

Zur Orientierung helfen Ihnen die farbigen Etiketten. So erkennen Sie Ihre gewünschte Geschmacksrichtung auf einen Blick.

- **Gelb:** mild bis süsslich
z.B. Resista, Ariwa, Fiorina
- **Rot:** kräftig, eher säuerlich
z.B. Topaz, Retina, Regold
- **Grün:** würzig, säuerlich; zum Backen und Kochen geeignet
z.B. Otava, Renora

Bio-Äpfel, guter Entscheid!

Ein Bio-Apfel ist kein makello- ses Kunstprodukt. Dafür sind seine inneren Werte und sein Geschmack umso wichtiger. Kleine Bussere Mängel sind Zeichen der Natur und werden innerhalb von klar definierten Bio-Sortenvorschriften toleriert!

Für den Anbau von Bio-Äpfeln werden ausschliesslich natürliche Hilfsstoffe verwendet. Diverse Studien des FiBL (Forschungsinstitut für biologische Landbau) belegen die hohe innere Qualität von Bio-Äpfeln.

Bio-Äpfel – Entdecken Sie ihre Vielfalt und Vorzüge!

Der Bio-Apfel: Ihr perfekter und praktischer Natur-Snack in allen Alltagssituationen!



Sanctions

- Competitor / Consumer / Consumer protection organisation can ask judge to (art. 9 UCL):
 - Prohibit the imminent use of an unfair “green” claim;
 - Remove an ongoing use of an unfair “green” claim;
 - Establish the unlawfulness of a specific “green” claim;
 - Publish the judgement;
 - Award compensation and moral damages.
- Criminal Liability
 - “Green” advertising that is not accurate and objectively justified can lead to criminal liability if committed intentionally (Art. 23 UCL).

Enforcement

- Right to file a claim (Art. 9 and 10 UCL):
 - Competitors
 - Consumers
 - Consumer Protection Organisations
- Burden of Proof
 - Judge may reverse burden of proof and ask advertiser to prove truthfulness and accuracy of its advertisement and statements contained therein (Art. 13a UCL)
- Jurisdiction
 - Civil Courts
 - Criminal Courts

Self-Regulation



- Private organisations dealing with unfair competition in advertising:
 - Swiss Commission for Fairness in Commercial Communications (formally an organ of the Swiss Advertising Foundation for Fairness in Commercial Communication and Member of the European Advertising Standards Alliance (EASA))
 - Representatives of advertising and media industries as well as representatives of consumer interests
 - No government authority but decisions generally adhered to
 - Sanctions:
 - Publish decision with full name / blame and shame
 - Issue recommendations to advertising media
 - Apply standards based on Swiss legislation and case law
 - Takes into account ICC-Code of Advertising and Marketing Communication Practice

Case Studies

- Swiss Commission for Fairness in Commercial Communication:
 - „Show you care about climate protection: use natural gas!“
 - ➔ No Violation as not misleading
 - „Heating with oil: for more climate protection“
 - ➔ Violation of art. 3 lit. b UCL and art. E1 ICC Code: incorrect and misleading

Conclusion

- Environmental or „Green“ claims in advertising must be
 - Accurate; and
 - not be misleading; and
 - must be objectively justified in the given context.
- If not:



Act of unfair competition leading to civil and possibly criminal liability.

Thank you for your attention.

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