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LANDMARK JUDGMENT OF THE GERMAN FEDERAL COURT OF JUSTICE (BGH): FACEBOOK'S EMAIL INVITATIONS CONSTITUTE UNFAIR ADVERTISING PRACTICE

vzbv also requests that Facebook be fined

- The highest German court BGH overall confirms the decision of the Berlin Kammergericht (Superior Court of Justice) of 24 January 2014.
- Importing address data via the Facebook Friend Finder tool, introduced by Facebook in 2010, contravenes consumer protection laws.
- Furthermore, vzbv requested that Facebook be fined since the IP licensing clause in its General Terms & Conditions has not been modified sufficiently to comply with the previous ruling in the view of the association.

Users can import their address books and find friends on Facebook with a single click. That sounds temptingly easy but may have unwanted consequences: Facebook sends email invitations in the name of the user to people who are not registered with Facebook – and who perhaps do not want to be. Many consumers have taken a conscious decision not to use Facebook. Today, in a landmark judgment following an action brought by the Federation of German Consumer Organisations (vzbv), the German Federal Court of Justice (BGH) declared this practice illegal. This could send a clear message to other providers.

“Our perseverance has paid off. After six years of lawsuits through all courts of appeal the supreme court of Germany has also confirmed that Facebook may not use personal data for advertising purposes without the consent of the people concerned. The dissemination of personal data of friends, colleagues or business partners via the Facebook Friend Finder is a sensitive issue. The rules on unfair advertising practices are restrictive and for a good reason. Consumers do not want to be pestered” says Klaus Müller, Executive Director of vzbv.

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The BGH today confirmed vzbv's opinion that Facebook may not use data imported from address books via the Friend Finder for advertising emails sent to people who are not registered with Facebook. These individuals have not given their consent for their data to be used by Facebook for this purpose. This business practice contravenes the German unfair competition legislation. "We now have to examine carefully what this judgment means exactly for the current Friend Finder" Müller continues. Other similar services use this type of advertising in order to attract new users. They, too, will probably have to rethink their practice.

Furthermore, the court confirmed vzbv's view that users were not informed about what Facebook's use of the data which was uploaded via the Friend Finder tool.

FINE: HALF-HEARTED RESPONSE BY FACEBOOK TO THE JUDGMENT AGAINST ITS GT&C CLAUSES

At the previous level of appeal, the Berlin Kammergericht had ruled parts of Facebook's General Terms & Conditions (GT&C) illegal. Since Facebook's appeal against their denial of leave to appeal was rejected for this part of the lawsuit the partial judgment is now legally binding.

However, in vzbv's view, Facebook has not yet amended its IP licensing clause sufficiently, even though the court ruled it to be illegal. Therefore, in December 2015, vzbv filed a demand for a significant fine to the Berlin Landgericht (District Court). "Changing a few words in a clause is not enough" Müller explains. vzbv is convinced that Facebook has made only editorial changes to the illegal clause while the content has remained the same.

The point in question is the following: When users consent to the company's GT&C, they also grant a wide-ranging right of use over their own content. When users post content that falls under intellectual property rights (especially photos and videos) on or in connection with Facebook, Facebook may use these globally and even grant sub-licenses to third parties. The court also found fault with the fact that the clause is not clear or comprehensible and hence confirmed vzbv's opinion.

UPDATE, FEBRUARY 29TH 2016

The Berlin Landgericht confirmed vzbv's request for a fine. The court has fined the social network Facebook to pay a 100,000 euros. The company had not adequately changed its controversial IP licensing clause in spite of final ruling by the Kammergericht Berlin (Superior Court of Justice). The order of the Landgericht Berlin for the payment of the administrative fine is not legally binding yet (Az 16 O 551/10).

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