

Tell-a-friend-verdict

The German Federal Court of Justice (BGH) announced an important verdict (I ZR 208/12) on the (im)permissibility of recommendation emails on 12 September 2013. The circumstances the BGH examined were as follows: The claimant, without having given his permission, received repeated product recommendations from the defendant, who had established a recommendation function on her website where she was named as the sender of the recommendation email. As a result, the complainant wanted an injunction against the defendant. The lower-court judgments (Local and State Courts in Cologne) had rejected this, on the grounds that the defendant could not be held responsible for the misuse of the recommendation function by a third party.

The Federal Court of Justice, however, did not share this opinion:

Firstly, the BGH defined the recommendation emails at issue as advertising in the sense of the directive 2006/113/EG.

Further, it was found that recommendation emails are always the responsibility of the website operator, regardless of whether a third party has triggered them. It was seen as particularly significant that the defendant (the website operator) appeared as the sender for the recipient of a recommendation email. Finally, it was decided that the whole purpose of a recommendation function is to bring attention to the website and the services offered there. The grounds of the verdict were:

“This verdict does not conflict with the idea that the defendant does not accept the abuse if the recommendation function. It is obvious that the recommendation function is used specifically to send recommendations to third parties, without any certainty that the recipient has given their agreement.”

As a result, the permissibility of the tell-a-friend function, at least when the recommended company appears as the sender of the email, depends clearly on whether the recipient has expressly given their permission to receive unrequested communication of this kind. If there is no documented agreement in existence, then protection is necessary for the user, who is powerless against the sending of unsolicited advertising emails. The emails are in these cases impermissible according to § 7 Abs. 2 Nr. 3 UWG.

Authors: Legal Team of the Certified Senders Alliance