Case Study: Ad Blocker

Ad Blocker II (Werbeblocker II)

Decision of the Federal Supreme Court (Bundesgerichtshof); 19 April 2018 – Case No. I ZR 154/16 (IIC 2019, 630)

1. An offer of software that allows Internet users to suppress the display of advertising when retrieving ad-funded Internet sites is not an unfair deliberate obstruction within the meaning of Sec. 4 No. 4 of the Act Against Unfair Competition. This is the case even when the program allows for certain advertisements to be shown when the advertisers pay the program's provider for this service.

2. The offer of an ad-blocking software also does not constitute an aggressive commercial practice within the meaning of Sec. 4a(1) of the Act Against Unfair Competition with respect to the companies with an interest in placing advertising.

Facts:

1 The plaintiff, a publishing company, and its subsidiaries publish newspapers and magazines … and make their edited content available on the Internet as well. They finance this offering with the payments they receive from other companies for publishing advertising on these Internet sites.

2 Defendant 1 sells software program A., an add-on program for all standard Internet browsers that suppresses advertising on Internet sites. Defendant 3 is managing director of defendant 1; defendant 2 held this position until 17 December 2015.

3 Typically, edited content from the online site ("content") is retrieved from a content server belonging to the plaintiff; advertising content ("ads"), on the other hand, from ad servers. When the user calls up an Internet page, edited and advertising content are presented as a uniform webpage. A. manipulates the access by the user's browser so that only files from content servers but not from ad servers are displayed.

4 A. blocks ads by applying filter rules contained in a so-called "blacklist". German users of A. by default use an international and a German filter list ("EasyList" and "EasyList Germany"). The defendant offers companies the option to have their ads exempted from this blocking by placement on a so-called "whitelist". The prerequisites for this are that these ads meet the defendant's standards of "acceptable advertising" and the companies pay the defendant a share of their profits. According to the defendant, it does not charge small and mid-sized companies a share of the profits in exchange for exemption from automatic blacklisting. On delivery to the user, A.'s default setting is to display the ads that are on the whitelist. The user can change this setting to additionally block the whitelisted ads.

5 The plaintiff and its subsidiaries have concluded no whitelisting agreement with defendant 1. Therefore all ads on their Internet pages are Blocked wehan A. is in operation.

6 With its action of June 2014 the plaintiff objects to the ad blocking effected by A. as a deliberate obstruction and an aggressive business practice. …

Findings:

…

13 – B. The plaintiff's appeal of this decision on points of law is unsuccessful. The defendants' appeal on the law, on the other hand, leads to the contested decision being set aside and the action being dismissed. The parties' appeals are admissible without restriction (see B I). The plaintiff's appeal on the law unsuccessfully contests the dismissal of the main injunctive claim (see B II). The defendants' appeal on the law successfully contests the court order following the alternative injunctive claim and the claim for finding a damage-compensation obligation (see B III and IV). The plaintiff's appeal on the law, finally, is also unsuccessful with respect to the dismissal of the disclosure claim (see B V). …

15 – II. The plaintiff's appeal on the law contests without success the dismissal of the main injunctive claim. While the plaintiff has legal standing pursuant to Sec. 8(3), No. 1 of the Act Against Unfair Competition (see B II 1), and the contested behaviour does also constitute a commercial practice within the meaning of Sec. 2(1) No. 1 of the Act Against Unfair Competition (see B II 2), the main injunctive claim is unfounded under both the aspect of a deliberate obstruction under Sec. 4 No. 4 of the Act Against Unfair Competition (see B II 3) and of the general market disruption under Sec. 3 of the Act Against Unfair Competition (see B II 4).

22 – 3. The court of appeal rightly assumed that the offering, sale and support of the program A. by the defendants do not represent a deliberate obstruction pursuant to Sec. 4 No. 4 of the Act Against Unfair Competition (Sec. 4 No. 10 of the former version of the Act).

23 – a) According to the provision of Sec. 4 No. 4 of the Act Against Unfair Competition, which, with effect from 10 December 2015, replaced Sec. 4 No. 10 of the former version of the of the Act Against Unfair Competition without substantive amendment [reference omitted], whoever engages in deliberate obstruction of competitors acts unfairly. An unfair obstruction of competitors presupposes an interference with the competitors' potential for competitive development that goes beyond the interference inherent in all competition and that displays certain features of unfairness. The interference is generally unfair when it deliberately pursues the purpose of preventing the development of competitors and thereby forcing them from the market, or when the interference leads to the obstructed competitors no longer being able to achieve their performance on the market by their own efforts in an appropriate manner. Whether these prerequisites are given can only be determined on the basis of an overall assessment of the

facts of the individual case taking into consideration the interests of the competitors, consumers and other market participants as well as the public [references omitted].

24 – b) The court of appeal found that an intent to cause damage could not be ascertained, because economic damages that competitors suffer via rivals' offers are inherent to competition and because no presumption of intent to cause damage is given. It also found that the plaintiff is not prevented from achieving its performance on the market by its own efforts in an appropriate manner. The offering of defendant 1 does not physically affect the goods or services of the plaintiff directly or indirectly. The software A. does not cause an interference with the sending of data flows when the plaintiff's websites are retrieved, but rather causes individual data packages to not reach the user. It only takes effect in the user's reception area. Furthermore, the users themselves are responsible for blocking filtered content because they have installed the software. No infringement of copyright is given, because when A. is used neither the programming of the websites is interfered with, nor is the plaintiff's content used unlawfully. While the freedom of the press demands protection for disseminating press products, including acquisition of advertising, the placement of ads is not precluded by A. On the other hand, stated the court, the users can take recourse to their negative freedom of information. This reasoning does not stand up to judicial review.

25 – c) The plaintiff's appeal on the law asserts without success that the defendants acted with intent to drive rivals out of the market because their business model can have no other purpose than to marginalise or weaken the competition. It aims solely to destroy the plaintiff's financing basis – advertising. In addition, through the contested behaviour, defendant 1 inserts itself unfairly between the plaintiff and its customers, as it forces the plaintiff to buy its way out of the ad block through whitelisting.

26 On the basis of the findings of the court of appeal, whose incompleteness is not criticised by the plaintiff's appeal on the law, no intent to harm can be found. The appeal on the law wrongly places the dispute in connection with the type of facts in which a practice aims first and foremost to harm the competitive development of the competition and not to foster one's own competitiveness [references omitted]. The business model at issue does adversely affect the plaintiff's advertising revenues by suppressing ads on its Internet site. However, the program of defendant 1 does not categorically preclude such gains, because it includes the possibility to allow advertising by whitelisting. The program of defendant 1 therefore requires the very functioning of the plaintiff's Internet site [references omitted]. That defendant 1 charges at least partially for this allowing of ads does not lessen the advertising of Internet site operators, but at the same time it does indicate the commercial self-interest at the root of the conduct at issue. If one furthermore considers the interest of those Internet users who, when visiting free-of-charge Internet sites, wish to block certain forms of advertising that defendant 1

has categorised as invasive by using A., the program they have installed, the contested business concept, as it turns out, is a customary service offer on the market that is not primarily aimed at harming the plaintiff's competitive development.

27 – d) The plaintiff's appeal on the law asserts without success that the defendants unfairly harm the plaintiff's competitive development, because program A. has a direct effect on the plaintiff's service provision. According to the plaintiff's appeal on the law, it is not relevant whether the plaintiff's server processes are obstructed, but that the service provided by the plaintiff – a package of edited and advertising content – is presented incompletely due to the ad blocker's interference, and its product is thus altered.

28 Contrary to the view of the plaintiff's appeal on the law, there is no unfair direct effect on the plaintiff's product. For this finding it can remain open whether, as the court of appeal assumed, a physical interference with the plaintiff's Internet site is lacking, because defendant 1's program does not affect processes in the realm of the plaintiff or the server drivers that transmit advertising, but only the display by the user's browser of the advertisement on the Internet site.

29 A product-related obstruction by direct interference with the competitor's product comes into consideration when the latter is destroyed, done away with, altered or damaged [references omitted]. The obstruction must in these cases emanate directly from the competitor, meaning the latter must have a direct effect on the product [reference omitted].

30 A direct effect on the part of the defendants is not found in the dispute at hand if only because installation and use of the program are reserved to the autonomous decision of the Internet user. No different than in the cases of obstruction of advertising [reference omitted], an obstruction that only arises due to a free choice of a further market participant as a matter of principle does not represent an unfair obstruction. Even if the plaintiff's appeal on the law asserts that defendant 1 alone decides which advertising is included in the filter lists used in A., and delivers its program with a default setting that 99% of the users do not change, the defendants only place a product at users' disposal the use of which the Internet user alone decides on. Contrary to the view of the appeal on the law, it is irrelevant in this context whether the contested product merely serves to facilitate processes that the user himself is capable of doing – like changing a television channel [reference omitted] – or whether the user himself could not readily achieve the result obtained due to the insurmountably complex technical difficulties. The provision of even a technically sophisticated product on the market does not in itself represent a direct effect on the product of the competitor.

31 – e) The court of appeal further rightly assumed that the requirements for an unfair obstruction in the form of an indirect effect on the plaintiff's product likewise are not given. An indirect effect on a product can be found in the sale of goods or services that are capable of giving third

parties illegitimate access to a service that is offered for sale [reference omitted]. It is also as a rule unfair to provide a product that has an influence on the product of a competitor when doing so circumvents a protection measure intended to prevent such an influence on the product [references omitted].

32 – (1) The court of appeal did not ascertain that defendant 1's program circumvents protection measures of the plaintiff's Internet site aimed against ad blockers. The plaintiff's appeal on the law does not assert that a submission to this effect has been overlooked. …

35 – (3) The required overall evaluation of the facts of the individual case taking into consideration the interests of the competitors, consumers and other market participants, as well as that of the public, leads to the outcome that in the case at hand no unfair obstruction in the form of indirect product influence is present. …

42 – 4. The court of appeal further correctly assumed that in the dispute at hand the requirements for a general market obstruction are likewise not fulfilled.

43 – a) The requirement found in Sec. 3(1) of the Act Against Unfair Competition of general market disruption is fulfilled when competitive conduct that is not in and of itself unfair, but that causes concerns either by itself or in combination with similar measures on the part of competitors, establishes the serious risk of competition based on entrepreneurial performance being significantly obstructed [references omitted].

44 – b) The court of appeal explained that defendant 1's program does hinder the plaintiff's possibilities of coupling freely accessible content with advertising. However, there are no indications that – as would be necessary for a general market obstruction – such offers without the simultaneous combination with advertising are no longer realisable. The plaintiff – on the contrary – has the option to use technical means to "block" users using ad blockers from its site or to offer its edited content for a fee. This assessment stands up to legal review.

45 – c) The plaintiff's appeal on the law asserts without success that defendant 1's program destroys the business model of providing free-of-charge, ad-funded content on the Internet. With this assertion the appeal does not demonstrate any legal error in the factual assessment by the court of appeal, but only complains of its – from the plaintiff's perspective – divergent result. On the basis of the findings of the court of appeal, which are not contested by the plaintiff's appeal on the law, it cannot be determined that due to the use of the contested program provided by defendant 1 any and all offering of ad-funded edited content on the Internet could be eliminated from the market. Here as well, the plaintiff must meet the challenges posed by the competition. It is not the task of the violation of obstruction or of unfair competition on the whole to preserve existing competitive structures or to counter economic developments in which the incumbent market participants see a threat to their client base [reference omitted].

46 – III. The defendants' appeal on the law successfully contests their conviction according to the alternative claim. The offering of an ad-blocker program using the whitelisting function contested by this claim does not contravene Sec. 4a of the Act Against Unfair Competition.

47 – 1. The defendants' appeal on the law complains without success, however, that the alternative injunctive claim is inadmissible, because in this regard there is no need for legal protection.

48 – The plaintiff asserts that its rights are infringed through the combination of the ad blocking (blacklisting) with the option to obtain access for certain advertising by means of a paid contract (whitelisting). In the case of suits for performance, which include injunctive actions, (cf. Sec. 241(1) second sentence Civil Code), as a rule there arises a need for legal protection out of the very lack of fulfilment of the asserted material claim whose presence is to be assumed for the examination of the interest in its judicial enforcement [reference omitted]. The explanation by the defendants that is given in the appeal on the law, that the making accessible in the case of a contract with the plaintiff or its subsidiaries would "probably" be free of charge, does not do away with the plaintiff's interest in a judicial clarification due to a lack of sufficient commitment.

49 – 2. Contrary to the view of the court of appeal, the conduct complained of in the action does not contravene Sec. 4a of the Act Against Unfair Competition.

50 – a) The court of appeal stated that the defendants' conduct constitutes an aggressive practice not against the plaintiff, but against market participants interested in placing advertising within the meaning of Sec. 4a(1) first sentence of the Act Against Unfair Competition, to the extent that the defendants exempt these market participants from the blocking function on condition of receiving a share of their profits. The parties are, with respect to competition for payments from advertising customers, competitors. The defendants, reasons the court of appeal, exert an unlawful influence under Sec. 4a(1) second sentence No. 3 of the Act Against Unfair Competition. The defendants' position of power consists in the blacklisting function through which a technically effected bar is erected that can only be overcome by the whitelisting function controlled by the defendants. This is an impediment of a non-contractual nature through which the exercise of contractual rights vis-à-vis the actual advertising partner is impeded. The position of the defendants secured by its control of the functions of the blacklist and the whitelist is evidently so strong that it acts as a "gatekeeper" of a substantial access to funding opportunities from companies wishing to place advertising. Whether the plaintiff as the owner of content has alternatives for placing advertising is not relevant according to the court of appeal, because the aggressive practice of the defendants also has an effect on the plaintiff's advertising customers. Whether the blocking of advertising fulfils a desire of many Internet customers is not relevant for the question of an aggressive commercial practice, because the latter targets the economic freedom of choice of different market participants than the users of the Internet sites,

and the protection of Sec. 4a of the Act Against Unfair Competition, above and beyond the Union law requirements, also has the aim of protecting non-consumers. The freedom of choice of the companies wishing to place advertising is considerably impeded because they could only escape the blocking by whitelisting. Companies that agree on whitelisting for a fee with the defendants are induced by the combination of blacklist and whitelist to use a service that they wouldn't have needed without the block. This assessment does not stand up to judicial review.

51 – b) Section 4a(1) first sentence of the Act Against Unfair Competition prohibits aggressive commercial practices that are capable of inducing consumers or other market participants to make a business decision that they would not otherwise have made. For the only point open to consideration in the case at hand, an unlawful influencing of the freedom of choice or behaviour of the consumer or other market participant (Sec. 4a(1) second sentence No. 3 Act Against Unfair Competition), it is required that the entrepreneur abuses a position of power with respect to the consumer or other market participant so as to exert pressure, even without use or threat of physical violence, in such a manner that substantially restricts the ability of the consumer or other market participant to make an informed decision (Sec. 4a(1) third sentence Act Against Unfair Competition; cf. Art. 2 lit. j in conjunction with Art. 8 of Directive 2005/29/EC).

52 – c) Because the plaintiff bases the asserted injunctive claim on the risk of repetition, the action is only founded if the conduct at issue on the part of the defendants was illegal at the time it was carried out as well as at the time of the decision in the appeal instance (established case law; cf. Federal Supreme Court, decision of 18 October 2017 – I ZR 84/16, GRUR 2018, 324 para. 11 = WRP 2018, 324 – *Kraftfahrzeugwerbung*). After the contested conduct of the defendant in the year 2014 and previous to the decision in the appeal instance on 19 April 2018, the applicable law in the case was amended with effect from 10 December 2015 by the second Act amending the Act Against Unfair Competition (Federal Law Gazette I 2015, p. 2158). Thereby the act regulated in Sec. 4, No. 1, Act Against Unfair Competition, former version, of unfair influence of the freedom of choice of a consumer or other market participant was transferred into the newly created provision of the Act Sec. 4a and revised in accordance with the rules on aggressive commercial practices under Arts. 8 and 9 of Directive 2005/29/EC concerning unfair commercial practices.

53 According to the case law of this Court, from this there follows no change in the legal situation with regard to commercial acts vis-à-vis consumers, because Sec. 4, No. 1, of the Act Against Unfair Competition, former version, was already required to be interpreted in conformity with Union law to the effect that an impairment of consumers' freedom of choice within the meaning of Sec. 4 No. 1 of the Act Against Unfair Competition, former version, is only present when the active party considerably impairs this freedom according to Arts. 8 and 9 of Directive

2005/29/EC through harassment, coercion or undue influence in the sense of Art. 2 lit. j of Directive 2005/29/EC [references omitted].

54 This applies likewise to commercial acts vis-à-vis other market participants who do not fall within the scope of application of the Unfair Commercial Practices Directive. In order to prevent a divided interpretation of the provision of Sec. 4 No. 1 Act Against Unfair Competition, former version, this provision must be interpreted according to the standard of Arts. 8 and 9 of Directive 2005/29/EC, including with respect to commercial acts vis-à-vis other market participants [references omitted].

55 – d) The court of appeal assumed that the defendants' conduct represented an aggressive practice aimed at market participants wishing to place advertising, in that the defendants exempted these participants from the blocking function in exchange for a share of their profits.

56 The defendants' appeal on the law complains in vain that the court of appeal thereby based its decision, in contravention of the principle of production of evidence, on a fact not submitted by the plaintiff, as the latter only ever submitted evidence on an aggressive act aimed at the plaintiff itself and not at the plaintiff's advertising clients.

57 In its furnished submission of 6 June 2016 the plaintiff explicitly asserted that the defendant also concludes whitelisting agreements with advertisers and not only with website operators such as the plaintiff, and that in this respect the defendant exerts pressure on advertisers, because the latter have no choice but to conclude a whitelisting agreement.

58 – e) The defendants' appeal on the law further complains without success that the court of appeal assumed, on the one hand, that the plaintiff is not itself affected by the business practice complained of in the alternative injunctive claim, but on the other hand affirmed the plaintiff's standing to bring an action as one of the parties competing for payments from companies looking to place advertisements. The objection to this raised by the defendants' appeal on the law that only competitors affected by the aggressive commercial practice are entitled to bring proceedings is not tenable. It is indeed acknowledged that, as regards the types of conduct from which Sec. 4 of the Act Against Unfair Competition protects fellow competitors, the right to assert a claim based on them is reserved to the competitor whose individual interest in protection is at stake [reference omitted]. However, this is not the case with the provision of Sec. 4a of the Act Against Unfair Competition, which prohibits aggressive commercial practices not in horizontal relationships, but vertically, in relation to consumers and other market participants [reference omitted].

59 – f) Likewise without success, the defendants' appeal on the law contests the assumption of the court of appeal that the defendant held a position of power within the meaning of Sec. 4a(1) second sentence No. 3 of the Act Against Unfair Competition with respect to advertising partners of the plaintiff. The counterargument raised by the appeal on the law, that a finding is lacking because the court of appeal – as expressed by the

term “evidently” – only intuits the scope of the software’s distribution, fails to demonstrate a legal error.

60 – A position of power within the meaning of Sec. 4(1) second sentence No. 3 of the Act Against Unfair Competition is a dominant position that can be situational or structural, based, for example, on economic superiority [references omitted].

61 While the defendants’ appeal on the law correctly points out that the court of appeal did not collect evidence regarding the disputed scope of distribution of A., the defendants themselves did, however, submit that the software is used on over 9.5 million end devices with Internet access. This statement, as well as the consideration of the undisputed contractual relationships of defendant 1 with the large-scale corporations Google, Amazon and Yahoo, support the finding of the court of appeal that the substantial access the technical blocking fixture gives the defendants to ad-funded companies interested in placing advertising is tantamount to a dominant position.

62 Furthermore, the complaint of the defendants’ appeal on the law is not tenable that the court of appeal failed to recognise in its assessment of the defendants’ technically founded position of power that the configuration of the software lies in the hand of the users, who could for example block all ads without regard for the whitelist. With respect to above-mentioned statements and the fact that defendant 1’s program is undisputedly delivered with whitelisting as the default setting, the fact-finding assessment of the court of appeal proves to be free of legal error in this respect as well.

63 – g) The defendants’ appeal on the law is, however, successful in contesting the assumption of the court of appeal that the undue influence under Sec. 4a(1) second sentence No. 3 of the Act Against Unfair Competition, consists in the plaintiff’s being impeded in the exercise of contractual rights within the meaning of Sec. 4a(2) No. 4 Act Against Unfair Competition, vis-à-vis its advertising partners.

64 The court of appeal assumed that the blacklist establishes a technical barrier that can only be overcome by the whitelisting controlled by defendant 1. The court held this to be a non-contractual restraint within the meaning of Sec. 4a(2) first sentence No. 4 of the Act Against Unfair Competition that impedes the exercise of contractual rights vis-à-vis the actual advertising partner because the display of the advertising can only achieved when access is granted by a third party, defendant 1. The objections of the defendants’ appeal on the law against this assessment are well-founded.

65 According to Sec. 4a(2) No. 4 of the Act Against Unfair Competition, the evaluation of whether a commercial act is aggressive must be based on onerous or disproportionate non-contractual barriers with which the entrepreneur attempts to impede the consumer or other market participant in the exercise of his or her contractual rights, which include the right to terminate the contract or to switch to other goods or services or to another entrepreneur. According to the wording and spirit of this

provision, the influence by which the attempt is made to prevent the exercise of contractual rights refers to such contractual rights that the consumer or other market participant are entitled to with respect to the entrepreneur who is acting aggressively toward him or her [references omitted].

66 In the dispute at hand, this requirement is lacking, according to the findings of the court of appeal, which assert that the defendant acts aggressively towards the plaintiff's advertising partners, and on the other hand that the hindrance of contractual exercise takes place in the relationship between the plaintiff and its advertising partners. The aggressor's influence on the exercise of rights in a contractual relationship between the consumer or other market participant affected by the commercial act and a third party does not fall under Sec. 4a(2) No. 4 Act Against Unfair Competition.

67 – h) Also successfully, the defendants' appeal on the law contests the assumption of the court of appeal that the defendants abuse their position of power in such a way as to significantly limit the ability of other market participants to make an informed decision.

68 The test for whether the ability to make an informed decision is significantly limited by the exertion of pressure must be carried out using the standard of the average addressee of the commercial act – here the other market participant [references omitted]. Such a limitation is present when the commercial act impairs the judgment of the other market participant, so that he or she can no longer sufficiently perceive and weigh the advantages and disadvantages of the transaction [reference omitted].

69 So far as the court of appeal assumed that large-scale website operators and advertising agents were impaired in their ability to make decisions, this cannot – on the basis of the further findings of the court of appeal – constitute a violation of Sec. 4a of the Act Against Unfair Competition, for according to the latter, not these but companies wishing to place advertising – (potential) clients of the plaintiff – are addressees of the defendants' aggressive commercial practices.

70 Furthermore, the appeal court's assumption that companies wishing to place advertising are impaired in their ability to make an informed commercial decision does not stand up to judicial review. The court of appeal based its assessment on an incorrect legal standard of the average addressee of the contested commercial act.

71 In the case of a commercial act addressed to other market participants, an average amount of commercial experience must be assumed on the part of the companies involved. In applying this standard, it cannot be assumed that the mere existence of whitelisting for pay impairs the judgment of the acting parties and induces these to behave irrationally [references omitted]. If a company intending to place advertising on the Internet is confronted with the phenomenon of ad blockers, it must be assumed that within the context of economic decision-making the available options will be considered and weighed in an entrepreneurial manner. …