

**I. Legislation**

(translations published by the Federal Ministry of Justice)

**Sec. 3, Act Against Unfair Competition (UWG): Prohibition of unfair commercial practices**

(1) Unfair commercial practices shall be illegal if they are suited to tangible impairment of the interests of competitors, consumers or other market participants. (...)

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**Sec. 4 (9), Act Against Unfair Competition: Examples of unfair commercial practices**

Unfairness shall have occurred in particular where a person (...)

9. offers goods or services that are replicas of goods or services of a competitor if he

- a) causes avoidable deception of the purchaser regarding their commercial origin;
  - b) unreasonably exploits or impairs the assessment of the replicated goods or services; or
  - c) dishonestly obtained the knowledge or documents needed for the replicas;
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## II. Elements of sec. 4 (9), Act Against Unfair Competition

1. “Competitive individuality” (“wettbewerbliche Eigenart”) of the imitated product (non-written element)

A good or service has competitive individuality if its specific embodiment or its specific features are capable of indicating its commercial origin or special characteristics to interested circles of the public. Competitive individuality can result from the design of a product but also from technical features, distinctive signs, slogans, functional elements and other characteristics of the good or service. It is not necessary that the good or service is known in the market.

2. Imitation (“replica”)

An imitation can only be assumed when and in as far as the incriminated product is *based* on the product with competitive individuality; the results of parallel conduct or double creation are no imitation. Additionally, the imitation test requires that the imitation is given in respect to the features constituting competitive individuality.

3. Particular competitive circumstances (a) - (c)

- Avoidable deception of the purchaser regarding the commercial origin of the goods and services (lit. a),
- unreasonable exploitation or damaging of the reputation of the imitated product (lit. b),
- illicit obtention of the knowledge or documents necessary for the imitation (lit c).

### Interdependence

The three elements (competitive individuality, imitation, particular circumstances) are interdependent. There is an interaction between the (degree of) competitive individuality, the degree of similarity/identity of the imitation and the intensity of the particular competitive circumstances. For instance, a lower degree of competitive individuality may be offset by a higher degree of imitation and/or by a higher intensity of the particular competitive circumstances and vice versa.

### III. Relevant case-law

1. Federal Court of Justice (Bundesgerichtshof, BGH) GRUR 1997, 308 – Wärme fürs Leben (“Warmth for life”)

The plaintiff is a regional energy company participating in a nationwide campaign of utilities constantly using the slogan “Wärme fürs Leben” as illustrated below:



The defendant, a syndicate of fuel dealers, publishes the following advertisement:



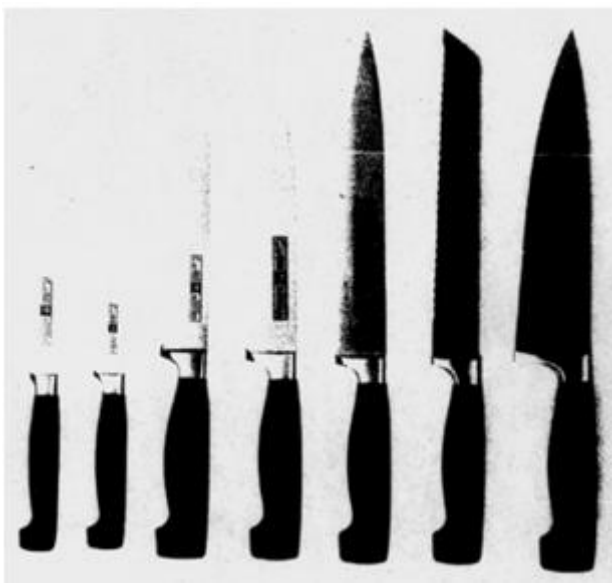
The plaintiff seeks an injunction against the use of the – merely descriptive – slogan “Wärme fürs Leben” (“Warmth for life”).

2. Federal Court of Justice (Bundesgerichtshof, BGH) GRUR 2001, 251 – VIER STERNE (“four stars”)

Zwilling, manufacturer and distributor of knives and plaintiff in the case, markets the knife series “VIER STERNE” (“four stars”). The blades of these knives have a transparent, removable cover stating the name and the seat of business of Zwilling, its trademark “Zwilling” and the name of the knife series:



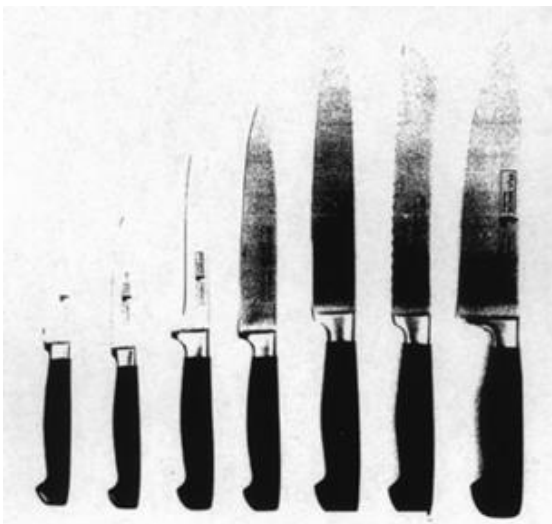
The knives of the four star series have the following appearance:



The defendant merchandises a knife series “CORDON BLEU” marked as shown below:



The knives of that series look as follows:





3. Federal Court of Justice (Bundesgerichtshof, BGH) GRUR 2003, 973 – Tupperwareparty

Tupperware, the plaintiff, is a producer of containers for household and kitchen use and owner of two trademarks “TUPPERWARE” covering diverse kitchen utensils in class 21. Tupperware pioneered a direct marketing strategy famous under the names “Tupperwareparty” and “Tupperparty”. The defendant, Leifheit, distributes household articles from his own production under the name “LEIFHEIT TopParty”:



The plaintiff seeks an injunction on basis of its trademarks and unfair competition.

4. Federal Court of Justice (Bundesgerichtshof, BGH) GRUR 2009, 1162 – DAX

The plaintiff (“Deutsche Börse”) operates several German stock exchanges. It calculates and publishes “DAX”, the best known German index product. The DAX index tracks the blue chips segment; it contains the shares of the 30 largest and most liquid companies traded at Frankfurt Stock Exchange. Deutsche Börse owns two word marks “DAX”, registered i.a. for the services of “stock exchange quotations” and “determining, including calculating and publishing a stock index” and “stock exchange, banking, stock exchange and financial brokerage services”. Commerzbank, the defendant, is one of the leading German commercial banks. It issues securities, particularly basket warrants calculated on basis of the DAX index, listed with the indication “based on DAX®” and a disclaimer denoting “DAX®” as a registered trademark.

The plaintiff raises a trademark and an unfair competition claim.

5. Higher Regional Court Frankfurt (OLG Frankfurt) GRUR-RR 2012, 75 – Schönheit von innen

Merz, plaintiff and producer of nutritional beauty supplements known under the name “Merz Spezial Dragees” uses the descriptive slogan

“Schönheit von innen”  
 (“beauty comes from within”).

It is owner of a word mark “Merz Spezial Dragees”, a word and device mark “Merz Spezial Dragees. Natürliche Schönheit von Innen” and a word and device mark “Merz Spezial Dragees. Natürliche Schönheit von Innen” depicting the packaging of the product. The defendant distributes supplements under the denomination

“Schönheit von innen”.

Merz applies for an injunction against the use of the sign “Schönheit von innen” by the defendant.

6. Hamburg District Court (LG Hamburg) NJOZ 2009, 4987 – Meine Bank

HASPA, a leading savings bank active in the Hamburg region and using the slogan “Meine Bank heißt HASPA” (since 1991), owns the word mark

“Meine Bank heißt HASPA”  
 (“my bank is HASPA”, but also: “my bench is HASPA”)

and the following word and device mark “Meine Bank” (“my bank”/“my bench”):



The defendant, a German subsidiary of the Unicredit Group, uses the claim

“Meine Stadt, meine Bank, meine Karte“  
 („my town, my bank/bench, my card“)

In a nationwide campaign. HASPA applies for an injunction against the use of the claim in the campaign.