Chapter 12
Disgorgement of Profits in German Law

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Abstract The rules for the disgorgement of profits in German Law cannot be traced back to a general principle. Three different approaches can be distinguished. Under certain circumstances the justification for ordering a disgorgement of profits is found in the infringer's intentional and calculated way of proceeding since a specific danger is posed by intentional perpetrators which is not adequately addressed by the mere prospect of (normal) liability for damages. In other cases, however, an order for the disgorgement of profits can arise from the specific nature of the legal duty that has been infringed (liability for the breach of fiduciary duties being an important example). Lastly, disgorgement of profits is also employed as a means of a comprehensive compensation for the damages suffered, as far as intangible property or personality rights are concerned; in these two instances mere liability for damages that can specifically be proved typically turns out to be inadequate, resulting in a structural under-compensation of the aggrieved party.

Keywords Disgorgement of profits in Geman Law

Definition and Concepts of Disgorgement

Disgorgement of profits can be viewed as the opposite of a damages claim. While damages compensate the loss that an aggrieved party has suffered, disgorgement of profits serves to restore the benefit gained by a person who illegally encroached on another person's rights. However, the concept of disgorgement of profits is not as clear as it seems at first glance because the profits gained from the infringement can be assessed in two different ways: on the one hand, an illegal benefit can be seen as the entirety of the assets that have accrued to the infringer as a result of the infringement; alternatively, an illegally gained benefit can be seen in the sum of money the infringer avoided paying by using another person's right without

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authorisation. In German law the term ‘disgorgement of profits’ usually only refers to the first form of – comprehensive – disgorgement of profits[1] and will therefore only be used in this manner in the following article.

Private Law

Intentional Acts in One’s Own Interest

De Lege Lata

Disgorgement of profits is explicitly enshrined in statute law in section 687(2) in connection with sections 681 and 667 Civil Code (BGB). According to these provisions, any person knowingly treating another person’s affairs as his own must surrender anything he obtained as a result of his actions. This form of liability is known as ‘non-genuine’ *negotiorum gestio (unechte Geschäftsführung ohne Auftrag* or *Geschäftsanmaßung)*. This concept is based on the traditional rules for ‘genuine’ *negotiorum gestio (echte Geschäftsführung ohne Auftrag)*, which prescribe that any person enforcing the interests of another person without having been authorised to do so is liable to surrender any proceeds of his actions in the same manner as an agent *(actio negotiorum gestorum directa)*. However, liability for ‘genuine’ *negotiorum gestio* is dependent on the *animus negotia aliena gerendi* – on a person knowingly managing another person’s affairs with the intention of benefiting that other person, since liability along contractual lines requires that the parties have reached a quasi-contractual concurrence of their intentions. But German law went a step further and developed the concept of ‘non-genuine’ *negotiorum gestio* which is laid down in section 687(2) BGB: in instances where someone intentionally takes advantage of another person’s legally protected interests to his own benefit, the lack of *animus negotia aliena gerendi* does not present an obstacle to an *actio negotiorum gestorum directa*: for equitable reasons the unauthorised person can be treated as if he had acted with *animus negotia aliena gerendi (unechte Geschäftsführung ohne Auftrag or Geschäftsanmaßung)*.[2]

But Section 687(2) BGB is actually not particularly relevant in practice: the prevailing opinion is that it does not apply to intentional breaches of contract[3], while the most important instance where it might apply – the infringement of intangible property rights – is covered by other, more specific claims which already

[1] König (1978), 179 et seq.; Rusch (2003), 2; Köndgen (1992), 696 et seq.; Köndgen (2000), 661 et seq.; Helms (2007), 6.

[2] Helms (2007), 120 et seq.

[3] Bundesgerichtshof (BGH) Neue Juristische Wochenschrift (NJW) 1988, 3018; BGH NJW-Rechtsprechungs-Report (NJW-RR) 1989, 1255, 1256 et seq.; Sprau (2014), § 687 no. 5; Beuthien (2011), § 687 no. 17.

provide for disgorgement of profits where the infringement was merely negligent. The practical use of the provision is further diminished by the fact that, according to the wording of section 687(2) BGB, *Geschäftsanmaßung* is not given with just any intentional infringement of another person's rights, but in fact requires the management of another person's affairs *("Führung eines fremden Geschäfts")*. An example of this deficiency is the Caroline of Monaco decision from 1994, where this requirement – according to the prevailing opinion – was not fulfilled. The case involved an infringement of the right of personality through the publishing of a contrived interview.[4] A further example can be seen in another decision of the Federal Supreme Court from 2006, in which it rejected a claim under section 687(2) BGB.[5] In that case a landlord had initially rented out an 8,000 m^2 property as a parking lot, but then later rented out part of the same property again to third parties for the use of market stalls without the initial tenant either noticing or suffering any concrete losses from this action. The first tenant's claim for the disgorgement of the profits which the landlord had accrued through this second rental was rejected by the Federal Supreme Court. The Court's decision turned on the fact that the landlord had not managed the first tenant's affairs within the meaning of section 687(2) BGB by renting out part of the property a second time as, according to their tenancy agreement, the first tenant would not have been permitted to rent out the property to a third party himself.

Although its practical importance is rather limited under the current state of German law, the approach to disgorgement of profits under section 687(2) BGB is based on the convincing idea that disgorgement of profits should be made available where the rights of another person have been intentionally infringed. On the one hand, this is because the belief of the intentional infringer that he will be allowed to keep his illegally gained profits is not worthy of protection. On the other hand, the intentional infringer poses a specific potential danger in light of the fact that he is in a position to weigh up whether the benefit he will receive from the infringement is greater than the damage he will cause (and may have to pay for).

De Lege Ferenda

In light of section 687(2) BGB's limited practical relevance it would appear congruous to give up on the provision's historically obsolete limitation to cases where the infringer had managed another person's affairs. Instead one could base the claims for disgorgement of profits specifically on the intentional infringement of another person's rights. This is precisely what was proposed by *Gerhard Wagner* at the 66th German Jurists' Forum *(Deutscher Juristentag)* in 2006 when he advocated

[4]Entscheidungen des Bundesgerichtshofs in Zivilsachen (BGHZ) 128, 1. On the question of a possible claim based on section 687(2) BGB in this case cf. Canaris (1999), 86; Köndgen (2000), 661, 666 and 670.

[5]BGH NJW 2006, 2323. Cf. also BGH NJW 2012, 3572, 3573.

deleting section 687(2) BGB and adding the following subsection 3 to section 251 BGB: "Where the person liable in damages has intentionally infringed the obligee's [= the injured party's] right, the obligee can – instead of compensation – demand disgorgement of the profits achieved by the person liable in damages and that he renders account of those profits." *("Hat sich der Ersatzpflichtige vorsätzlich über die Berechtigung des Gläubigers [= des Geschädigten] hinweggesetzt, so kann dieser statt des Schadensersatzes die Herausgabe des Gewinns, den der Ersatzpflichtige erzielt hat, und Rechnungslegung über diesen Gewinn verlangen.")*.[6]

However, the participants at the German Jurists' Forum reacted to this suggestion in a contradictory fashion: although there was widespread agreement over disgorgement of profits being the preferred solution for deterring intentional infringements of others' rights for the sake of profit[7], *Wagner's* suggested amendment of section 251 BGB was rejected by an overwhelming majority.[8] The overly broad wording of *Wagner's* provision was probably partly responsible for this rejection. It would not be appropriate for any and all intentional infringements of another's right to automatically entitle him to a disgorgement of profits, even where that action only played a very minor part in achieving that profit. Or should a thief be required to surrender game shot with a stolen gun?[9] It could still be argued from a theoretical perspective that such cases would only lead to a partial disgorgement of profits, but dividing profits is immensely difficult in practice.

It would be preferable to develop more precise rules for determining which intentional infringements of another person's rights can justify a disgorgement of profits. I am of the opinion that the deciding factor therein is whether the infringement merely amounts to usurping another person's right without having been authorised to do so, or whether the injured party was additionally deprived of the opportunity to profit from that right because he had the option to refuse to permit another to make use thereof on strategic grounds in order to realise the opportunities for profit granted by that right himself.[10] Such a constellation would almost necessitate the disgorgement of the illegal profits in favour of the rightholder.

Breach of Fiduciary Duties

Further justification for an order to disgorge profits can derive from the particular nature of the infringed duty. This applies specifically to fiduciary duties, which

[6]Wagner (2006b), A 97.

[7]Ständige Deputation des Deutschen Juristentages (ed.) (2006), L 91, Proposal VI.1., adopted with 50:24:15 votes.

[8]Ständige Deputation des Deutschen Juristentages (ed.) (2006), L 91, Proposal VI.3.a., rejected with 18:58:13 votes.

[9]Example offered by von Monroy (1878), 160.

[10]Helms (2007), 156 et seq.

obligate the fiduciary to exclusively pursue the interests of the beneficiary, as is the case with, for example, partners, directors or administrators. The most common infringements of these duties which are of great practical importance are the acceptance of bribes from third parties,[11] the pursuit of economic activities in competition with those of the beneficiary[12] or the use of the entrusted goods and resources for one's own purposes.[13]

Although explicit provisions for disgorgement of profits only exist in relation to prohibition of competition (*Wettbewerbsverbote*, cf. section 61(1) Commercial Code (HGB); section 113(1) HGB; section 88(2) Companies Act (AktG)), a general principle that mandates that breaches of fiduciary duties lead to disgorgement of profits can be found in German law:[14] if the (intentional or negligent) infringement of a fiduciary duty creates a conflict of interests, the profits attained are to be restored to the beneficiary even if the latter has not suffered any measurable damage and would never have made the profits himself.

In this instance the liability to surrender all illegal profits can be seen as a natural consequence of the specific nature of the duty that has been infringed: where an autonomous and influential position is entrusted to someone, there is inevitably a risk that he will exploit it to his own benefit. At the same time, the possibility of supervising the fiduciary's activities is limited by the autonomous nature of his position. Unconditional trust in the loyalty and trustworthiness of the fiduciary is therefore essential for granting such an influential position. However, this trust is destroyed where the fiduciary exploits his position to his own benefit. Where a breach of duty is constituted by the breaching party achieving a benefit for himself the law's reaction cannot be anything other than to deprive him of that benefit.

Reaction to the Inadequacy of Compensation

Intangible Property Rights

Disgorgement of profits also plays an important role in Germany as a special form of compensation. German law explicitly provides for disgorgement of profits as a special form of compensation for a number of different types of infringements,

[11] Entscheidungen des Reichsgerichts in Zivilsachen (RGZ) 99, 31; BGHZ 38, 171; BGH Wertpapier-Mitteilungen (WM) 1992, 879 et seq.; BGH NJW-RR 1987, 1380.

[12] RGZ 45, 31; BGH WM 1957, 1128; BGH WM 1976, 77; BGH WM 1977, 194; BGHZ 38, 306; BGHZ 80, 69, 74; BGHZ 89, 162, 171; BGH NJW-RR 1989, 1255, 1257.

[13] BGH WM 1967, 679; BGH WM 1979, 1328, 1330; BGH WM 1971, 412, 414; Bayerisches Oberstes Landesgericht (BayObLG) Wohnungswirtschaft und Mietrecht (WuM) 1996, 653; Fleischer (2003a), 1045, 1050 and 1056; Fleischer (2003b), 985, 986 et seq.

[14] Rusch (2003), 242 et seq.; Fleischer (2003a), 1045 et seq.; Hopt (2004), 1, 48 et seq.; Helms (2007) 369 et seq., especially 472 et seq.

such as copyright infringements (section 97(2) UrhG),[15] patent infringements (section 139(2) PatG),[16] design patent infringements (section 42(2) GeschMG),[17] infringement of utility models (section 24(2) GbmG)[18] and trademark infringements (section 14(6) MarkenG).[19] The current wording of the respective provisions is based on the EU Directive on the enforcement of intellectual property rights of 29 April 2004 (Dir 2004/48). According to Art. 13(1)2 lit. a of this Directive, in case of an infringement of intellectual property rights the 'actual prejudice' (Art. 13(1)1) is to be compensated whilst taking all 'appropriate aspects' into account, including 'any unfair profits made by the infringer'.[20]

Claims of this type are also recognised as being part of legal custom where other kinds of rights have been infringed, such as the right of personality,[21] insofar as economic value can be attributed to the right of personality, the same applies to the infringement of naming rights and company name rights.[22] Other types of cases in which disgorgement of profits has been recognised as a remedy include certain forms of unfair competition, as long as a legal status similar to an absolute legal interest has been infringed.[23]

Conceptually, the idea of disgorgement of profits being a special type of compensation appears contradictory at first glance since disgorgement of profits is defined as the conceptual opposite of compensation (cf. the definition of disgorgement of profits above). However, a closer look reveals important similarities between the two approaches. To begin with, it is evident that illegal gains made through the infringement of another person's right can correspond to the damage suffered by the aggrieved party. But even where the profits made do not correspond to the damages suffered, the profit made through the illegal exploitation of another person's legal interest indicates the potential for pecuniary exploitation inherent in that interest. Moreover, demanding precise evidence of actual damages suffered by the aggrieved party is sometimes unrealistic. Particularly problematic in this context is the infringement of intangible rights. If, for example, a patent or a right of personality is infringed the aggrieved party suffers no direct tangible damage (unlike with damage to a material object). Indeed, the patent or personality right can still be used and/or exploited unreservedly by its holder. It is also often difficult to prove what gain the aggrieved party has foregone through the unauthorized use of the right

[15] BGH Gewerblicher Rechtsschutz und Urheberrecht (GRUR) 1959, 379.

[16] RGZ 43, 56; RGZ 156, 65, 67; BGH GRUR 1962, 401, 402.

[17] BGH GRUR 1963, 640, 642.

[18] RGZ 50, 111, 115 et seq.

[19] BGHZ 34, 320; BGH GRUR 2006, 419.

[20] On the impact on German law see Meier-Beck (2012), 503.

[21] BGH NJW 2000, 2195, 2201; cf. also BGHZ 20, 345, 352 et seq. and BGH NJW 2007, 689, 690.

[22] BGHZ 60, 206, 208 et seq.

[23] BGHZ 57, 116, 117 et seq.; BGHZ 122, 262; BGH GRUR 1995, 349. On the exploitation of trade secrets see BGH GRUR 1977, 539, 541 et seq.

by the other person. If compensation were to be confined to specific damages that can be shown by the aggrieved party this would run the risk of having no effective sanction for such infringements in the abovementioned types of cases.

Nonetheless, until 2000 disgorgement of profits had almost no role to play in practice in cases such as these. Firstly, this was down to the fact that only that part of the profits that directly resulted from the exploitation of the infringed legal interest could be reclaimed.[24] Secondly, the infringer could deduct not only any and all costs associated with the particular infringing act from the profit, but also a proportion of his general overhead.[25] This burdened the calculation of that profit with so many uncertainties that it was much simpler for the injured party to demand compensation in the amount that the infringer would have had to pay if he had acquired a licence to exploit the respective legal interest (cf. the second profit calculation method mentioned above). This was fundamentally changed by a decision of the Federal Supreme Court in 2000 in which it was held that when calculating the profit to be disgorged the flat proportion of the infringer's general overhead could no longer be deducted. Instead, only those costs that were specifically caused by his actions that led to the accrual of the illegal gains, e.g. materials, production, administrative and distribution costs would be deductible.[26] This decision completely changed the importance of claims for disgorgement of profits – in some fields it has even become predominant in practice.[27]

Rights of Personality

Case law has followed a similar tack in relation to the calculation of compensation for the infringement of rights of personality,[28] for example where photographs are published without permission,[29] false or derogatory accusations are made[30] or contrived interviews are published.[31] In the year 1994, the Federal Supreme Court expressly emphasized that the award of damages must also reflect the

[24] RGZ 35, 63, 75; BGH GRUR 1962, 509, 512; BGH NJW 1992, 2753, 2757 et seq.; BGHZ 150, 32, 42 et seq.; on the practice of the division of profits cf. Grabinski (2009), 260, 264 et seq.

[25] BGH GRUR 1962, 509, 511; Oberlandesgericht (OLG) Köln GRUR 1983, 752.

[26] BGHZ 145, 366, 372.

[27] Grabinski (2009), 260, 262 (on infringements of patents and utility models); comprehensive on this issue Janssen (yet unpublished), Part 3, Chapter 1, E.III.2. However, disgorgement of profits continues to be irrelevant where financially valuable rights of personality have been infringed.

[28] Where a financial value is attributed to the right of personality, the rules relating to disgorgement of profits as a special form of compensation take effect, cf. footnote 22.

[29] BGH NJW 2005, 215.

[30] OLG Hamburg GRUR-Rechtsprechungs-Report (GRUR-RR) 2009, 438; OLG Hamm GRUR 2004, 970; Landgericht (LG) Ansbach NJW-RR 1997, 978; OLG Köln Zeitschrift für Urheber- und Medienrecht (ZUM) 1999, 948.

[31] BGHZ 128, 1.

fact that the rights of personality were infringed in order to attain a profit. The Court stated that a 'real deterrent effect' must be inherent in the damages such that they can 'counterbalance' the perpetrator's illegal gain.[32] This case law has led to a (moderate) increase in the amounts awarded for compensation where media organisations in particular infringe rights of personality in contemplation of profiting therefrom.[33]

Even though the Federal Supreme Court does not prescribe a true disgorgement of profits where rights of personality have been infringed, rather treating the illegal profit as a mere factor in the calculation of compensation for the infringement, the similarity to disgorgement of profits as a special form of compensation for the infringement of intangible property rights is immediately apparent: in both situations disgorgement of profits is employed as a measure to ensure extensive compensation of the injury, thus allowing the sanction to fulfil its role as a deterrent. However, achieving that goal in relation to infringements of rights of personality would necessitate the courts having the ability to order a genuine disgorgement of profits in particularly egregious cases of systematically calculated infringement.[34]

Competition Law

Similar to infringements of intangible property rights, under section 33(3)3 of the Act against Restraints of Competition (GWB), which was reformed in 2005, profits made by a corporation in intentional breach of antitrust law can be taken into account when calculating damages. Disgorgement of profits was also introduced in this instance in reaction to the fact that a precise calculation of the concrete loss suffered is not always feasible, since it is difficult to determine how market prices would have developed if antitrust law had not been breached.[35] However, asserting claims under section 33(3)3 GWB is plagued by severe evidentiary difficulties as only the profit that directly resulted from the breach of antitrust law must be disgorged. The provision currently appears to be of little relevance in practice.[36]

In addition to the abovementioned provision, section 10(1) Unfair Competition Act (UWG) allows certain organisations and institutions to demand the disgorgement of illegal profits achieved through intentional breaches of competition law at the expense of a multitude of consumers. A parallel provision can be found in section 34a GWB for intentional breaches of antitrust law. The legislature hereby intended to compensate for sanction deficits in relation to dispersed and

[32] BGHZ 128, 1, 16; cf. also BGH NJW 2005, 215, 216.

[33] Helms (2007), 295 et seq.

[34] Cf. similarly Dreier (2002), 132 and 348; Schlechtriem (1995), 362, 364; Wagner (2006a), 352, 385 et seq.; Wagner (2006b), A 89; Helms (2007), 309.

[35] Bundestagsdrucksache (BT-Drs.) 15/3640, 35, 54; cf. Janssen, Präventive Gewinnabschöpfung, Part 3, Chapter 3, E.I. (unpublished).

[36] Van Raay (2012), 100; Janssen (yet unpublished), Part 3, Chapter 3, F.II.

petty losses.[37] Thus far these claims have been of little relevance in practice[38] because, firstly, an intentional breach of law must be proven and, secondly, the disgorged profit has to be surrendered to the Federal budget, which means that the organisations and institutions entitled to assert these claims have no incentive to shoulder the risks of litigation.[39]

Criminal Law and the Law of Administrative Offences

Not allowing a perpetrator to illegally profit from his actions is not only an important purpose of criminal law, but also of the law of administrative offences. In some respects disgorgement of profits is easier to effect in these branches of law than it is in private law, particularly since the offender has perpetrated a very grave wrong and is to be punished in any event.

Under section 73 et seq. of the Criminal Code (StGB), a criminal court can order the disgorgement of any profits accrued by an offender from the commission of a criminal offence *(Verfall)*. This instrument has become very important in practice.[40] However, under section 73(1)2 StGB the claims of individually injured persons take priority. This leads to, for example, drug dealers and arms dealers being subjected to disgorgement of profits while priority is given to the return of stolen property when punishing thieves. Criminal law disgorgement of profits is also much simpler than its private law equivalent because the 1992 change in the law provides for the disgorgement of the entire profit without enabling the offender to subtract any costs incurred in his illegal endeavour *(Bruttoprinzip)*.[41]

A similar option of ordering disgorgement of profits is also given where an administrative offence has been committed (section 29a Administrative Offences Act (OWiG), cf. also section 34(1) GWB for antitrust law). However, unlike its criminal law equivalent, this is merely a subsidiary instrument that may only be employed where no fine has been ordered.[42] The law of administrative offences prioritises fines as a means of indirect disgorgement of profits.[43] Section 17(4) OWiG explicitly provides that a fine must exceed the economic advantage that the offender achieved through the commission of the administrative offence.

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[37] BT-Drs. 15/1487, 23 and BT-Drs. 15/3640, 36.

[38] Examples of successful proceedings under section 10 UWG to date mostly relate to online "traps", OLG Frankfurt GRUR-RR 2010, 482 und OLG Frankfurt GRUR-RR 2009, 265; cf. also OLG Stuttgart GRUR 2007, 435.

[39] Goldmann (2013), § 10 no. 5: "§ 10 ist praktisch totes Recht"; similar Emmerich (2007), § 34a no. 4.

[40] Retemeyer (2012), 56 "heute Standard"; Mainzer (2002), 97, 98 and 103.

[41] BGH NJW 2002, 3339; Rönnau (2003), no. 182 et seq.

[42] Rönnau (2003), no. 27.

[43] Retemeyer (2012), 56, 57.

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