[DE] Federal Constitutional Court Decides on Title Merchandising on Public Television

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The Federal Constitutional Court (Bundesverfassungsgericht - BVerfG) has decided on 28 October 1998 not to accept a constitutional complaint entered by the ZDF (Zweites Deutsches Fernsehen). Title merchandising of all kinds of products therefore does not fall under the protection of the freedom of broadcasting guaranteed by Article 5, para. 1, clause 2 of the Basic Law.

In 1987, the ZDF had broadcast a serial entitled "The Guldenburg Heritage" (Das Erbe der Guldenburgs) which was partly filmed in a castle. Even before the shooting had been completed, the owner of the building had registered two trademarks "Guldenburg" in order to legally protect certain drinks as well as a variety of food and agricultural products. He also applied for such a trademark for jewellery. The ZDF entered a civil action against this which, however, was dismissed in last instance by the Federal Supreme Court (Bundesgerichtshof - BGH).

The ZDF had appealed against this decision, arguing that the BGH had misjudged the importance of freedom of broadcasting.

The BVerfG based its decision on the view that freedom of broadcasting primarily is a freedom of programmes, guaranteeing that selection and contents of programmes as well as programming concepts remain a matter of radio or television and may be freely based on journalistic guidelines. An even indirect influence of third parties on broadcasting for non-journalistic purposes would be incompatible with such principles and is therefore not covered by article 5, para. 1, clause 2 of the Basic Law. Such an influence would have to be feared if TV stations were granted comprehensive and exclusive rights to commercialise their programme titles also for more remote types of products, for which no trademark claims to protect against possible confusion with the broadcast programme are provided by § 16 of the law against unfair competition (Gesetz gegen den unlauteren Wettbewerb - UWG). The denial of such exploitation rights ruled by the BGH, in effect excluding any influence on programming for instance through licensing, would work against such a threat. In addition, the BVerfG underlines that freedom of broadcasting indeed includes the exploitation of own productions as well as the peripheral commercialisation of programme parts. Decisions to date had left open whether the legislation regulating the freedom of broadcasting was entitled to grant public-law institutions any kind of commercial activity.

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Nevertheless, there would be no doubt whatsoever that economic aims not covered by the function of public-law broadcasting did not fall under the protection of the freedom of broadcasting. The economic activities are therefore limited and restricted by the broadcasting function.

Bundesverfassungsgericht, Beschluß vom 28. Oktober 1998, Az. 1 BvR 341/93 .

Federal Constitutional Court, decision given 28 Oct. 1998, Az. 1 BvR 341/93 .

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