[DE] Film as Extended Advertising Programme

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Wolfram Schnur
Institute of European Media Law (EMR), Saarbrücken/Brussels

In a judgement given on 15 October 1998, the Berlin Administrative Court (VG Berling) authorised the ProSieben Media AG by means of provisional legal protection to broadcast the Willy Bogner film "Fire, Ice, and Dynamite" (Feuer, Eis und Dynamit) without having to indicate that it is an extended advertising programme. The film had already been the issue of two competition legislation decisions of the Federal Court (BGH: Judgement dated 6 July 1995 I ZR 58/93 and judgement dated 6 July 1995 I ZR 2/94). The BGH instructed the Willy Bogner Film GmbH to point out the particular advertising nature of the film to the cinema audience before the showing, arguing that it contains hidden commercial advertisements. The film shows advertising symbols and products from brand manufacturers embedded into the plot in an open and caricatural way.

The ProSieben Media AG entered an application with the relevant media authorities of Berlin-Brandenburg (MABB) for the transmission of the film in their programme schedule if an indication by the producer drawing attention to the advertising nature was shown beforehand. However, the MABB ruled that the film had to be announced as advertising programme and that it had to be indicated as such during the entire transmission. Under § 7, para. 4 of the Agreement between the Federal States on Broadcasting (RundfunkstaatsvertragRfStV) from 1996, extended advertising programmes are allowed if the advertising nature is clearly placed in the foreground and if advertising represents a major part of the programme. They need to be announced as extended advertising programmes and must be indicated as such throughout the entire programme. § 7, para. 5 of the RfStV prohibits masked advertising and § 7, para. 3, clause 1 and 2 of the RfStV requires the separation of advertising and regular programme. The term "masked advertising" is also to be found in Article 1 lit. d) and the principle of separation of advertising and regular programme is found in article 10, para. 1 of the guideline 89/552/EG in its version modified by guideline 97/36/EG.

In its decision, the Berlin Administrative Court stated that the film was not an extended advertising programme as the advertising nature was not clearly placed in the foreground. Neither could masked advertising be detected, in the opinion of the court, since the film lacked the decisive element of deception and because the film "openly plays with products, names, and brands". Regarding the principle of separation of advertising and programme, the court did indeed establish an infringement of the text which, however, could not justify prohibiting the

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transmission altogether. Instead, the provision under § 7, para. 3 of the federal broadcasting agreement would have to take second place, as the film protected by the freedom of art under article 5, para. 3 of the Basic Law could otherwise not be broadcast. In the opinion of the court, the desire to protect the spectator from deception as to the advertising nature of the transmission is sufficiently taken care of through an explanatory indication prior to the programme.

According to the regional media authorities for Berlin-Brandenburg, a settlement has been reached in the meantime. The indication of the advertising nature of the film will have to be shown after each commercial break. In accordance with the wishes of the parties concerned, however, the main legal procedures pending are to be maintained until the legal status has been definitely clarified.

Beschluß des VG Berlin vom 15. Oktober 1998, Az. VG 27 A 323.98.

Decision of the Berlin Administrative Court given 15 October 1998, Az. VG 27 A 323.98.

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