[DE] Federal High Court on Entitlement of Broadcasting Companies to a Share of Revenue from Sales of Recording Equipment and Blank Cassettes

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In a judgement on 12 November 1998, the First Court of Appeal of the Federal High Court (BundesgerichtshofBGH), whose field of competence includes copyright law, asked to consider the long-running debate over whether broadcasting companies, as phonogram manufacturers, should be entitled to a share of revenue from sales of recording equipment and blank cassettes, ruled in favour of the broadcasting companies. The West German Broadcasting Corporation (Westdeutsche Rundfunk - WDR) had asked to sign a copyright protection agreement with the Performing Rights Society (Gesellschaft zur Verwertung von Leistungsschutzrechten - GVL), which protects the rights of performing artists and phonogram manufacturers, on the grounds that it was producing numerous phonograms through its radio orchestras and choir and was granting licences for the marketing of these products. It believed that, like any other phonogram manufacturer, it was entitled to a share of the revenue from sales of recording equipment and blank cassettes. The Performing Rights Society had refused to sign the requested agreement. It believed that the WDR was not entitled to any payment, not least because if broadcasting companies were given a share of the revenue, it would be at the expense of the other copyright holders, since the revenue from sales of recording equipment and blank cassettes could not be increased. Whereas the Regional Court (Landgericht - LG) had dismissed the action, the Court of Appeal (Oberlandesgericht - OLG) had upheld it insofar as it concerned productions published in phonogram form (CDs, music cassettes). In its judgement, the Federal High Court dismissed the copyright collection society's action against the Court of Appeal's decision.

The Copyright Act grants copyright for the work not only of authors, but also of performing artists (Section 73 ff of the Copyright Act), phonogram manufacturers (Sections 85 and 86 of the Copyright Act) and broadcasting companies (Section 87 of the Copyright Act). In addition, Sections 75 (2), 85 (1) sentence 1 and 87 (1) sentence 2 make provision for the reproduction of phonograms or copyrighted programmes to be prohibited. The law (Section 53 of the Copyright Act) makes certain exceptions as far as reproduction for private purposes is concerned, but these are compensated by the fact that it grants authors and other performing rights holders an entitlement to remuneration (Sections 54, 54a, 54f and 54g of the Copyright Act). As such claims cannot be paid directly to entitled individuals,

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the law prescribes that, for all recording equipment and blank cassettes suitable for such reproduction, an amount is due which, under Section 54 of the Copyright Act, is to be administered and divided among those entitled by a copyright collection society. On the assumption that broadcasting companies are less damaged by private recordings of their programmes than other copyright holders, the law contains one exception to the effect that such companies are not entitled to any payment for private recordings. The scope of this exception is a matter of dispute.

In its judgement, the Federal High Court crucially took into account the fact that the broadcasting company's rights may coincide with those of the phonogram manufacturer. There was no apparent reason why broadcasting companies should be treated differently with regard to their own marketed products than other phonogram manufacturers. The Federal High Court stressed, however, that a share of revenue could only be considered in respect of a company's own productions sold on the phonogram market. As long as broadcasting companies stored their productions on phonograms without supplying them for other uses, the exclusion from entitlement to remuneration set out by law would stand.

Urteil des BGH vom 12. November 1998; AZ. I ZR 31/96.

Judgement by the BGH (Federal High Court) on 12 November 1998, file no. I ZR 31/96.

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