[DE] Hanseatic Court of Appeal Rules on the Re-Publication of Photographs on CD-ROM

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In its judgement on 5 November 1998, the Hanseatic Court of Appeal (Oberlandesgericht - OLG), responding to an appeal by the FreeLens press photographers' association, amended the decision of the Hamburg Regional Court (Landgericht - LG) of 29 August 1997.

The proceedings concerned whether the Spiegel publishing company was entitled to include photographs originally published in the Spiegel news magazine between 1989 and 1993 in annual CD-ROM editions without the specific permission of the photographers concerned. The Hamburg Regional Court had dismissed the original action on the grounds that the use of CD-ROMs was already known in 1989 and was basically no different to the usual practice of making the whole year's issues available again either in printed form or on microfilm (see IRIS 1998-1:7).

The Hanseatic Court of Appeal did not share this opinion, but upheld FreeLens' appeal for an injunction and awarded it the right to compensation. This decision was based on the Court's finding that the Spiegel publishing company had not been transferred the right to re-use the photographs on CD-ROM. While the Hamburg District Court had denied the existence of a separate use in the sense of Section 31 (4) and (5) of the Copyright Act (Urheberrechtsgesetz UrhG), the Court of Appeal was satisfied that this did exist. The Court based its decision on the belief that the CD-ROM was likely to be used more intensively than a printed or microfilm version. The Court did not believe that its decision contradicted the case law of the Federal High Court (Bundesgerichtshof BGH), which had ruled (Judgement of 11 May 1989 - cable; Judgement of 4 July 1996 - satellite) that various forms of broadcasting (cable, satellite, terrestrial) did not constitute separate uses since the only difference was in the technical nature of transmission. In contrast, the Hanseatic Court of Appeal held that CD-ROM constituted a separate use because of the quick search facility, its user-friendliness, small size and, in particular, the ease with which digital data could be reproduced and disseminated via international data networks. The Court did not believe that exploitation rights had been transferred either tacitly or by implication. It argued that, under the so-called transfer of purpose principle (Section 31 (5) of the Copyright Act), verbal agreements could not be interpreted as including the transfer of rights with respect to what was then a rare use of photographs, ie the publication of news magazines on CD-ROM.

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Urteil des Hanseatischen OLG vom 5. November 1998, Aktenzeichen 3 U 212/97.

Judgement of the Hanseatic Court of Appeal, 5 November 1998, file no. 3 U 212/97.

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