[DE] Niedersachsen Higher Administrative Court on Surreptitious Advertising

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In a judgement of 15 December 1998 the Niedersachsen Higher Administrative Court (Oberverwaltungsgericht OVG) dismissed the appeal of the television company RTL Television against a decision of the Land Media Authority of Niedersachsen.

The subject of the original dispute was the observation that RTL Television, in broadcasting a programme, had violated the ban on surreptitious advertising. A repeat broadcast of the programme had also been forbidden. The children's programme concerned had been devoted to the "Barbie Doll", which was celebrating its thirtieth birthday. During the programme, phrases such as "the Barbie-look has always been absolutely fantastic", "simply enchanting", "you can really get a taste for this" and "mad about Barbie" were used. Under Article 6 (5) (which corresponds with the existing rule in Article 7 (5) of the Agreement between Federal States on Broadcasting in the third amended version of 26 August-11 September 1996) of the 1991 Agreement between Federal States on Broadcasting, surreptitious advertising is forbidden. In Section 7.1 of the Länder Media Authorities' Joint Guidelines on Advertising, to ensure separation of advertising and programme material, and on Television Sponsorship, adopted on 26 January 1993 (with almost exactly the same wording as the current version of 13 December 1997), the portrayal of commercial goods, their manufacturers, services or service providers outside commercial breaks is not classed as surreptitious advertising if it results predominantly from reasons of dramatic effect or the duty to supply information. Section 7.2 of the Guidelines states that, even when the portrayal of products and services is authorised, programme editors should, as far as possible, avoid advertising them. In principle, for a programme to be found to contain surreptitious advertising, it must be shown that it served advertising purposes and that the viewer could have been misled as to its real purpose.

The Court rejected the plaintiff's view that advertising, as described in the Agreement between Federal States on Broadcasting, referred only to third-party advertising. Rather, it held that surreptitious advertising could also be carried out by the programme itself. In this case, the Court decided that the programme had served advertising purposes. Basically, the Court had no objection to the fact that the "Barbie Doll" had been shown on the programme itself on the occasion of its thirtieth birthday, as it saw this as a suitable and objective opportunity to inform

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the public about the occasion and to help it form an opinion. However, the Court found that not only had the programme taken the form of an advertisement from an objective point of view, but there had also been a commercial intention, which distinguished the permissible portrayal of a product of exceptional public interest from surreptitious advertising, which was prohibited. In the Court's opinion, the portrayal of the "Barbie Doll" exceeded what was necessary to satisfy the public interest and meet dramatic requirements. In addition, it found that the public had been misled in the sense of Article 6 (5) of the 1991 Agreement between Federal States on Broadcasting and Section 7.1 of the Guidelines on Advertising. The Court also found a breach of Article 26 (1) of the 1991 Agreement between Federal States on Broadcasting, which prohibited commercial breaks during children's programmes, since the ban on interrupting children's programmes for advertising purposes applied especially in cases where advertising took place during the programme itself.

Niedersächsiches Oberverwaltungsgericht, Urteil vom 15. Dezember 1998, Az. 10 L 3173/96.

Judgement by the Niedersachsen Higher Administrative Court, 15 December 1998, file no. 10 L 3173/96.

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