[DE] New Rulings on Extended Advertising Programmes and Surreptitious Advertising

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In two judgements delivered on 15 April 1999, the Berlin Administrative Court (Verwaltungsgericht - VG) upheld earlier rulings made in the granting of provisional legal protection.

The first case (file no. VG 27 A 289.98) concerned whether the feature film " Feuer, Eis und Dynamit " should be indicated as being an extended advertising programme (see IRIS 1999-1:6). The applicant broadcaster had appealed against the decision of the Berlin-Brandenburg media authority (MABB) under which the film could only be broadcast if it were indicated as being an extended advertising programme.

In the Court's opinion, the Berlin-Brandenburg State Agreement on Media (Medienstaatsvertag) contained no legal basis for the supervisory authority to go beyond the existing range of measures available, i.e. complaints, levies and fines. According to the Court, the MABB therefore had no right to rule that the film should only be broadcast if it was indicated as being an extended advertising programme. In the substance of the case, the Court ruled that, on account of the broadcaster's application, the film could be shown in accordance with broadcasting law provided an announcement was made at the beginning of the film that it contained brand names in return for payment by the brand owners. Following the ruling made in granting provisional legal protection, the Court confirmed its opinion that the action of the film remained to the fore despite the simultaneous appearance of brand names and that, as such, the programme met the criteria of a feature film rather than those of an extended advertising programme. The Court also confirmed its findings concerning surreptitious advertising and the principle of separation of advertising and programme material. Since it did not contain any element of deception, the film could not be described as surreptitious advertising and so any obligation to indicate that the film was an extended advertising programme would constitute a disproportionate restriction of broadcasting freedom. Moreover, the classification of the film as programme material meant that advertising regulations did not apply.

In the second case (file no. VG 27 A 20.98) the Court considered a television programme which featured and recommended hotels and restaurants in and around Berlin. The MABB had ruled that the programme should be classified as an extensive advertising programme and had ordered that it be labelled as such

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throughout the broadcast. By means of provisional legal protection, the broadcaster concerned had been allowed to broadcast the programme without any such indication until the main issue was settled (see IRIS 1998-8:7). In its latest ruling, the Court finally confirmed the decision taken when provisional legal protection had been granted. Although the initial ruling had essentially been made on the grounds that the hotels and restaurants concerned had not paid to be featured in the programme, the judgement was based on the finding that the programme was more informative than commercial in character. According to the Court, the question as to whether or not a programme should be classified as an extensive advertising programme should have nothing to do with whether it contained promotional elements in return for payment. Against the background of broadcasters' basic right to broadcasting freedom provided for in Article 5.1.2 of the German Constitution (Grundgesetz), the Court held that only programmes in which advertising was an editorial concept should be classified as extensive advertising programmes. Surreptitious advertising had to contain a deceptive element while the requirement for separation of advertising and programme material could not have been breached as the broadcast had been classified as programme material.

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