[DE] Films Rightly Classified as Pornographic

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In a judgment of 4 October 2000, the Verwaltungsgericht Hamburg (Hamburg Administrative Court) dismissed a complaint by Premiere Medien GmbH & Co. KG (appellant). The appellant had challenged a decision by the defendant, the Hamburgische Anstalt für neue Medien (Hamburg New Media Authority - HAM), in which it had found the appellant to have breached the ban on pornography by broadcasting five films.

The appellant claimed in the proceedings that the HAM's decision had been unlawful, in particular on the grounds that it had based its assessment of the films concerned on a false definition of pornography. The assessment had been made on the basis of the criminal law concept of pornography, which the Bundesgerichtshof (Federal Supreme Court - BGH) had defined in 1969 (BGHSt 23, 40, Funny Hill ruling). The appellant argued that, in accordance with the relevant law, the HAM should have interpreted the concept of pornography from a youth-protection point of view, according to which pornography was not prohibited per se, but only if it was deemed seriously harmful to minors. In the appellant's view, the films would not have been classified as pornographic if the HAM had used the correct definition.

However, the Court decided that the HAM's complaint had been lawful. The defendant had been right to rule that the appellant had breached Section 9 of the Hamburgische Mediengesetz (Hamburg Media Act - HmbMedienG) in connection with Section 3.1 of the Rundfunkstaatsvertrag (Agreement between Federal States on Broadcasting - RStV), since according to Section 3.1 RStV, to which Section 9 HmbMedienG referred, programmes are illegal "if they are pornographic (see Penal Code Section 184)". In its judgment, the Hamburg Administrative Court began by explaining that the reference in Section 3.1 RStV should be interpreted as referring to the whole of Section 184 of the Strafgesetzbuch (Penal Code - StGB) rather than just to certain parts, such as Subsections 3 to 7 (hard pornography). The Court considered the assessment criteria used by the defendant in classifying the disputed films as pornographic to be lawful. Since the Penal Code contained no legal definition, the legislator had deliberately left it up to the courts to interpret this basic concept. In assessing whether something was pornographic, the courts had so far referred to the abstract characteristics mentioned by the BGH in its Funny Hill ruling. The change in society's attitude to this kind of material had been taken into account insofar as it was now only considered pornographic if it clearly overstepped the boundaries of sexual

decency, judged in accordance with common public morals. In the Court's opinion, it was not appropriate to replace the existing definition of pornography with a new concept focusing on the impact on minors. On account of the seriousness of the damage that might be caused, the legislator, unsure of whether and possibly what kind of sexual material was harmful to children and teenagers, had taken the precaution of stipulating that pornography always posed a serious danger to minors and was therefore prohibited. It was therefore wrong to decide whether material was pornographic on the basis of whether or not it actually harmed young people. This attempt to define pornography according to its effect on children and teenagers was flawed, since the effects of pornography were unknown. Moreover, pornography could not be defined purely on the basis of the danger posed to minors because Section 184 of the Penal Code aimed not only to protect youngsters from pornographic material, but also to prevent adults from coming across it unintentionally.

Urteil des Verwaltungsgerichts Hamburg, Az: 12 VG 2246/98

Judgment of the Hamburg Administrative Court, case no. 12 VG 2246/98