[DE] Surreptitious Advertising Acquittal Quashed

IRIS 2002-8:1/9

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The Oberlandesgericht Celle (Celle High Court of Appeal

- OLG) recently quashed the decision by the Amtsgericht Hannover (Hannover District Court - AG) to acquit "Big Brother" producer Endemol Entertainment Productions GmbH (Endemol) on the charge of surreptitious advertising. It referred the case for review.

The Niedersächsische Landesmedienanstalt (Lower Saxony Regional Media Authority -NLM) had fined Endemol because its then managing director had deliberately broadcast surreptitious advertising. During the live broadcast in question by RTL Television GmbH (RTL), advertising rules had been broken when, following a telephone call with the manufacturer, the programme presenter had repeatedly referred to a particular caravan, naming the manufacturer, who had provided the caravan free of charge (see IRIS 2001-4: 6).

The OLG considered in particular whether Endemol, as the programme producer, could be treated as a broadcaster in the sense of Article 49 of the Rundfunkstaatsvertrag (Agreement between Federal States on Broadcasting - RStV) and therefore be guilty of breaching the ban on surreptitious advertising contained in Article 7.6.1 of the RStV in connection with No.9 of the Gemeinsame Richtlinien der Landesmedienanstalten für die Werbung, zur Durchführung der Trennung von Werbung und Programm und für das Sponsoring im Fernsehen (Common Guidelines for the Regional Media Authorities on Advertising, the Separation of Advertising and Programme Material and Television Sponsorship) of 10 February 2000. Concerning this question, the OLG ruled that the concept of broadcaster as mentioned in Article 49 of the RStV should be interpreted broadly so as to include the programme producer as well as the actual broadcasting company. The decisive factor here, as deduced from the case-law of the Bundesverfassungsgericht (Federal Constitutional Court), was whether the producer had the authority to determine the content of the programme and when it was broadcast, rather than whether it was authorised and licensed in accordance with the RStV. The OLG criticised the AG for failing to offer sufficient grounds on matters including the authority held by RTL and Endemol's potential influence on the programme's content.

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Even if Endemol could not be described as the "broadcaster", the OLG indicated that it had the legal status of a commissioned body under the terms of Section 9.1.2 of the Gesetz über Ordnungswidrigkeiten (Administrative Offences Act - OWiG). As such, it could also be responsible under broadcasting law for the content of broadcast programmes. In contrast to the AG's view, the OLG thought that the OWiG's definition and system of laws could certainly be interpreted in such a way that the commissioned body described in the aforementioned provision could be a legal rather than a natural person. The AG therefore now had to examine whether Endemol had the relevant level of responsibility that was the determining factor in this case. To this end, it had to assess whether Endemol had been able, on its own initiative and without seeking approval from elsewhere, to take the measures required to prevent the offence taking place.

The OLG also referred back to the AG the question of whether surreptitious advertising had actually taken place and whether Endemol had been party to a breach by RTL of the ban on surreptitious advertising.

Urteil vom 23. Mai 2002, Aktenzeichen 222 Ss 34/02 (Owi)

Judgment of 23 May 2002, case no. 222 Ss 34/02 (Owi)

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