

[DE] Admissibility of Pornographic Broadcasts

IRIS 2002-10:1/9

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In a judgment of 19 September 2002, the Bayerisches Verwaltungsgericht München (Bavarian Administrative Court, Munich - VG München) ruled on the admissibility of pornographic television broadcasts. It referred to the rules of interpretation laid down in the judgment issued by the Bundesverwaltungsgericht (Federal Administrative Court - BVerwG) on 20 February 2002 (see IRIS 2002-3: 7), which established an important principle.

The case concerned the lawfulness of a ban imposed by the relevant supervisory authority, the Bayerische Landeszentrale für neue Medien (Bavarian Office for New Media - BLM), on the broadcast of various pornographic films which had been shown by the legal predecessor of Premiere. The films had been broadcast in encrypted form on a pay-TV channel. They could only be viewed with a decoder and a PIN number. Furthermore, they had been shown using the near-video-on-demand system, which enables the broadcaster to start the programme at various times in close succession. Viewers can then watch the film whenever they want.

Whereas Premiere considered this system to be an individual dial-up service and therefore a media service, the court classified it as broadcasting in the sense of the Rundfunkstaatsvertrag (Inter-State Agreement on Broadcasting - RStV). It was a service available to the general public. Although the number of viewers was restricted, there was no individualised transfer of data. Programmes which were transmitted in encoded form or which could be received in return for payment were included in the definition of broadcasting given in Article 2.1.2 of the RStV.

Article 3 of the RStV, which prohibits pornographic broadcasts, was therefore relevant. In accordance with the rules set out by the Federal Administrative Court (see IRIS 2002-3: 7), the VG München concluded that the films concerned were pornographic in the sense of Section 184 of the Penal Code. According to Article 3 of the RStV and Section 184.1 of the Penal Code, they should therefore not have been broadcast in a way which might have made them accessible to minors. Both courts stated that the TV broadcast of pornographic films was only acceptable if minors were prevented from seeing the films by means of effective barriers. This meant firstly that the equipment for decoding the encrypted films should only be sold to adults and, secondly, that at least one additional effective barrier should be built in to the system to prevent minors gaining access. There had to be some kind of guarantee that only adults would be able to cross that barrier. The VG

München considered that the first requirement had been met, since subscriptions to the channel were only available on presentation of official proof of identity. This meant that a reliable age check could be carried out in order to ensure that the general decoding equipment needed to receive the pay-TV channel was sold only to adult customers. However, it did not believe any additional barrier had been in place. In particular, it thought that an additional PIN number was not an effective barrier, since the same number applied for all pay-per-view programmes and children might therefore use it to watch an important sports event, for example. Moreover, the PIN number could be transmitted via an ISDN-equipped telephone, so age controls could not be enforced. The broadcast of the disputed programmes was therefore illegal.

The possible nature of the first "effective barrier" has therefore been established. However, it is not clear whether a special PIN number used to access erotic films is sufficient as the additional barrier and, if it is, how the user's age can be effectively monitored.

