[CH] Capacity of an Exclusive Licence Holder to Instigate Legal Proceedings

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The capacity of an exclusive licence holder to instigate legal proceedings in the case of the violation of copyright by a third party has been a controversial issue for some time. Capacity to instigate proceedings in this case means the ability of a licence holder, in their own name, to claim a ban and the ceasing of the infringement of copyright.

The matter has finally been clarified by the Federal Court in a decision delivered on 29 August 2007. The judges in Switzerland's supreme court have upheld that, in its current version, the federal legislation on copyright and neighbouring rights of 9 October 1992 (Copyright Act – "LDA") does not confer on a licence holder the capacity to instigate legal proceedings in the event of a third party infringing the rules on copyright. The Federal Court, nevertheless, admitted that the right to instigate legal proceedings may be transferred to the licence holder, who would then have the capacity to instigate legal proceedings against a third party, if this were to be explicitly or implicitly authorised by the copyright holder. It is not, however, necessary for the party granting the licence to include such authorisation in the actual licence contract; authorisation may also be given separately or subsequently, even with a view to dealing with a specific case.

In the case brought before the Federal Court, the judges had to consider the capacity of the Swiss national broadcasting company Société Suisse de Radiodiffusion et Télévision (SSR) to instigate legal proceedings in the context of the case involving the French company Métropole Télévision, which operates the M6 television channel. Since January 2002, Métropole Télévision has been broadcasting a second signal (separate from the one used for broadcasting to France) including advertising directed specifically at viewers in the French-speaking part of Switzerland. The Federal Court allowed SSR to instigate proceedings (in its capacity as an exclusive licence holder) on the basis of the authorisations granted by the holders of copyright for the films and series broadcast by both SSR and M6.

It should be noted that, on 22 June 2007, the Federal Parliament adopted an amendment to the federal Act on patents allowing the holder of an exclusive licence the capacity to instigate legal proceedings. On this occasion the Federal Parliament had also revised the Copyright Act in order to harmonise all intellectual property legislation with regard to the capacity to instigate legal

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proceedings. Thus, the new Articles 62, paragraph 3, and 65, paragraph 5, LDA provide that a person holding an exclusive licence may him-/herself instigate legal proceedings on the grounds of violation of copyright on condition that the licence contract does not explicitly exclude this. The new Article 81a LDA, nevertheless, states that the rules on the capacity of licence holders to instigate legal proceedings only applies to licence contracts concluded or confirmed after the entry into force of the new legal provisions, which will probably be sometime in 2008.

Arrêt 4A_55/2007 rendu par le Tribunal fédéral le 29 août 2007

Decision 4A_55/2007 delivered by the Federal Court on 29 August 2007

Loi fédérale sur le droit d'auteur, modifications du 22 juin 2007

Federal Act on copyright, amended on 22 June 2007

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