[DE] VG Berlin Objects to "Promotion" Label for Infomercial

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In a ruling of 26 May 2008, the *Verwaltungsgericht Berlin* (Berlin Administrative Court – VG) rejected an application by the TV broadcaster ProSieben for interim legal protection against an objection lodged by the *Medienanstalt Berlin-Brandenburg* (Berlin-Brandenburg media authority - mabb) concerning an infomercial.

At the start of the broadcast on 30 November 2007, the programme was labelled as a " *Dauerwerbesendung* " (infomercial) and, during the broadcast, as " *Q.-Promotion* ". The mabb complained that this breached the programme labelling obligation set out in Art. 7 para. 5 of the *Rundfunkstaatsvertrag* (Inter-State Broadcasting Agreement - RStV) in connection with para. 8.2 of the *mabb* advertising guidelines, according to which an infomercial must be denoted as such before it begins and for its entire duration. According to ProSieben, the mabb issued a decision on 28 December 2007 in its role as broadcasting regulator, requiring the broadcaster not to repeat the infringement in future.

ProSieben appealed the decision on 28 January 2008 and applied for interim legal protection on 29 January 2008. ProSieben argued that it had not breached Art. 7 para. 5 RStV, since this provision did not stipulate that the term "*(Dauer-)Werbesendung*" had to be shown. It also referred to Art. 49 para. 1 no. 5 RStV, under which failure to label the programme as an infomercial was punishable but the use of a different label was not. It claimed that the word "*Promotion*" was a common synonym for "Advertising" and that labelling the programme as an infomercial might cause advertisers to use other media instead. The objection put ProSieben at a disadvantage compared to the print media and public service broadcasters, which were subject to less stringent advertising rules, it argued.

The VG's decision essentially concurred with the arguments put forward by the mabb. It stated that the wording of Art. 7 para. 5 sentence 2 RStV suggested that infomercials must be labelled *as such* . A viewer who selected the programme while it was being broadcast should be able to recognise its commercial character immediately. However, the editorial structure of the infomercial had the potential to mislead viewers, particularly if the vague label of "*Promotion*" was used. The weakness of this label was confirmed by the broadcaster's own admission that it feared losing advertising customers if the term "*(Dauer-)Werbesendung* " was

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used. The reference to Art. 49 para. 1 no. 5 RStV did not hold water, since an inadequate or incorrect label should be considered the same as the absence of a label for the purposes of the provision.

The VG did not believe that ProSieben had been unfairly discriminated against. Print media were not comparable because their impact on consumers was much less intense. There was no evidence that ARD and ZDF had been allowed to label infomercials as "*Promotion*" and, in any case, they were not under the mabb's jurisdiction. The use of the term "Promotion" constituted a breach of the rules on programme separation and labelling.

Beschluss des VG Berlin vom 26. Mai 2008 (Az. VG 27 A 37.08)

http://www.berlin.de/imperia/md/content/senatsverwaltungen/justiz/gerichte/vg2/entscheidungen/vg_27_a_37.08.beschluss.pdf

Ruling of the VG Berlin of 26 May 2008 (case no. VG 27 A 37.08)

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