[AT] Second Federal Communications Court Decision on the Monitoring of Advertising in the Case of ORF Programmes

IRIS 2008-10:1/6

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On 1 September 2008, the *Bundeskommunikationssenat* (Federal Communications Court – BKS) reached a further decision (Case 611.009/0013-BKS/2008) on alleged offences reported by the *Kommunikationsbehörde Austria* (Austrian broadcasting regulator – KommAustria) concerning programmes broadcast by ORF.

In this second decision, the BKS dismissed KommAustria's allegation that in three programmes broadcast by ORF1 on 9 November 2004 there had been a breach of section 14(5) of the *Bundesgesetz über den Österreichischen Rundfunk* (Austrian Broadcasting Corporation Act – ORF-G) relating to product placement.

In the case of two of the programmes, KommAustria's allegations concerned viewer game shows that took place either during the programme or after the closing credits and in the course of which items and manufacturers' brands were displayed on screen for a few seconds. The third allegation concerned a programme in the course of which two fitness apparatus items and game consoles were used as part of participant competitions and therefore shown on screen. The manufacturers' names could not be recognised. With regard to the first two programmes, the BKS ruled that they constituted product placement within the meaning of section 14(5) of the Austrian Broadcasting Corporation Act but dismissed the allegation owing to the triviality of the offence, stating that an objective standard should be employed to examine whether the nature of the presentation was such that it was, according to prevailing opinion, normally made against payment and whether the usual payment exceeded the limit of EUR 1000. The key parameters for the calculation were the spatial extent as well as the programme's duration and geographical coverage. The calculation made on the basis of these criteria by the BKS did not result in a breach of the *de minimis* threshold. With regard to the third programme, the BKS refused to describe it as product placement as there were insufficient details to identify the products.

An appeal against this decision can be lodged within six weeks.

Entscheidung des BKS vom 1. September 2008 (GZ 611.009/0013-BKS/2008)

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