[CH] M6’s Swiss Signal Violates Copyright and Constitutes Unfair Competition

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The company Métropole Télévision operates the French television channel M6. Although this is aimed at the French public, it is possible to receive its signal, broadcast by satellite and terrestrially, in Switzerland as a result of natural overspill. Since January 2002, Métropole Télévision has been broadcasting a second signal, separate from the one used for broadcasting in France. This second signal, distributed in Switzerland by a number of cable distributors, uses all the programming broadcast by M6 in France, but incorporates advertising messages directed specifically at viewers in the French-speaking part of Switzerland. Thus Métropole Télévision in fact operates a second set of advertising during its programming, using Swiss advertisers.

Télévision Suisse Romande, a branch of the Swiss radio and television broadcasting company (*Société Suisse de Radiodiffusion et Télévision* - SSR), also broadcasts a good number of the films and series that are available on M6. In November 2003, SSR brought proceedings against Métropole Télévision before the court of the canton of Fribourg to have M6’s programming including Swiss advertising declared unlawful. On 29 August 2007, the Swiss Federal Tribunal allowed SSR to instigate proceedings against Métropole Télévision and referred the matter to the cantonal court for a further decision (see IRIS 2008-3: 9).

In a decision delivered on 12 February 2009, the civil court of appeal of the cantonal court of the State of Fribourg admitted the proceedings brought by SSR. It held that by broadcasting programming that included advertising slots specifically directed at the Swiss public Métropole Télévision was violating the copyright of the parties holding the rights for the works being broadcast in their programming, inasmuch as the latter had not authorised such broadcasting. The judges found that swapping the advertising messages during the simultaneous broadcasting of the work, in order to reach a different target public, affected the content of the programme and was equivalent to a new broadcast specifically directed at a territory which was not part of the broadcasting territory covered by the contract. Consequently, in the absence of authorisation, this further broadcast violated the exclusive right of the originators or their beneficiaries to broadcast the works in question.

The court in Fribourg stated that the contractual clauses authorising the natural overspill, an involuntary and technically unavoidable phenomenon, did not give a

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concession-holder licence to broadcast anything other than material for which it held rights. Consequently, if the concession-holder went beyond the rights held, more particularly by overstepping the authorised territorial limits, it was violating not only the contract but also the copyright protection held by the party conceding the rights. Lastly, in its judgment the court held that the broadcasting of a work with an advertising slot directed specifically at the Swiss public, carried out in violation of copyright law, gave Métropole Télévision an unlawful competitive advantage and therefore constituted a violation of national legislation on unfair competition.

Arrêt 42 2007-132 du 12 février 2009 rendu par la Cour d'appel civil du Tribunal cantonal du Canton de Fribourg

Decision no. 42 2007-132 of 12 February 2009 delivered by the civil court of appeal of the court of the Canton of Fribourg

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