[DE] DSF Cleared of Surreptitious Advertising

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In a ruling of 5 March 2009, the *Bayerische Verwaltungsgericht München* (Bavarian Administrative Court, Munich - VG, case no. M 17 K 07.5805) decided that DSF Deutsches Sportfernsehen GmbH did not breach the ban on surreptitious advertising in its broadcast of the programme PartyPoker-Football & Poker Legends Cup on 22 November 2006.

The programme featured a poker tournament. On the poker table, the words "PartyPoker.com Football & Poker Legends Cup" were printed in large letters. They were visible for a total of 16 of the 44 minutes of transmission time, which the *Bayerische Landeszentrale für Neue Medien* (Bavarian New Media Office - BLM) considered to be a form of surreptitious advertising. Such advertising is banned in Germany under Art. 7(6) of the *Rundfunkstaatsvertrag* (Inter-State Broadcasting Agreement - RStV), which states that surreptitious advertising occurs when goods, services, etc. are deliberately mentioned or portrayed for advertising purposes of which the general public may be unaware (see Art. 2(2)(6) RStV).

The VG did not deem the screening of these words to be surreptitious advertising. It thought that it could not be proven that DSF had intended to advertise. In individual cases, such an intention should be positively established as an element of the facts, generally through circumstantial evidence, which was not produced in this case. An essential reason for drawing this conclusion was the fact that no payment had been made and that there was no proof that reduced licence fees had been paid. Another reason for concluding that there was no intention to advertise was the fact that, under the licence agreement with the programme producer, DSF was not authorised to adapt the programme in order to make the advertisement unrecognisable.

The BLM had argued that the programme could have been adapted afterwards because the tournament was not broadcast live. It fundamentally criticised the DSF's arguments, claiming that they were ultimately based on the fact that the tournament had taken place abroad and that a local broadcaster and sponsor had deliberately edited the television coverage in such a way that the advertising was clearly visible for long periods. It argued that, in such cases, the broadcaster should not be allowed to lay the blame on foreign producers, but should assume responsibility itself. The court disagreed.

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Urteil des Bayerischen Verwaltungsgerichts München (VG), 5. März 2009 (Az.: M 17 K 07.5805)

Ruling of the Bavarian Administrative Court, Munich, 5 March 2009 (case no. M 17 K 07.5805)

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