[DE] OVG Denies Obligation to Pay to Use Archive Material in Film Production

IRIS 2010-3:1/17

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In a ruling of 17 December 2009, the *Oberverwaltungsgericht Münster* (Münster Higher Administrative Court - OVG) decided that the system of fees charged by the *Landesarchiv* (State archive - LA) of North Rhine-Westphalia (NRW) for the presentation of archive material in television programmes is illegal in its current form.

The plaintiff in this case had asked the LA for permission to inspect certain archive material and a licence to film individual items in connection with the production of a historical documentary film. The LA granted the permission requested and, after the film had been completed, issued a corresponding invoice to the plaintiff. This was based on the provisions of the *Gebührenordnung* (scale of charges - GebO) for the NRW State archive and charged the plaintiff for presenting the filmed archive material in television, video and film productions, as well as repeat showings. The plaintiff protested against this invoice and, when its protest was refused, instituted legal proceedings. It argued, *inter alia*, that the LA was not entitled to charge fees for the presentation of archive materials in television or film broadcasts, since the fees related to the use of the LA and did not apply to presentation in a television programme. The service provided by the LA was simply to make the relevant documents available. The LA rejected this, arguing that its charges were based on how the archive material was used.

The lower court had rejected the complaint. The OVG now ruled in the plaintiff's favour. In particular, it noted that para. 3.2 of Appendix 2 to the GebO, on which the LA's decision was based, was invalid on the grounds that it lacked an effective legal basis. The provisions of the *Archivgesetz* (Archive Act - ArchivG NRW) and *Gebührengesetz* (Fees Act - GebG NRW), on which the charges were based, were each dependent on use of the LA. According to the ArchivG NRW, such use resulted from direct use of archive materials, "but not the use of products created through the use of archive materials". The fee charged under para. 3.2 was not linked to the use of the archive materials themselves during the film production, but to the screening of this production, which had been created using the archive materials. The same applied from the point of view of use of a reproduction. It was doubtful whether acts such as this could be categorised as the reproduction of archive material. In any case, however, even if they could, the broadcasting of the film did not constitute a direct use of the reproduction. The exploitation of

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usage rights could only be taken into consideration "as a value factor in the calculation of the fee and the determination of the amount".

There is no right of appeal against this decision.

Urteil des OVG Münster vom 17. Dezember 2009 (Az: 9 A 2984/07)

http://www.justiz.nrw.de/nrwe/ovgs/ovg_nrw/j2009/9_A_2984_07urteil20091218.html

Decision of the OVG Münster of 17 December 2009 (case no: 9 A 2984/07)

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