[CH] M6 Will Be Able to Continue Broadcasting Advertising in Switzerland

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In a decision that puts an end to seven years of proceedings between the Société Suisse de Radiodiffusion et Télévision (SSR) and Métropole Télévision, the *Tribunal Fédéral* (Swiss Federal Court - TF) has now judged that the Swiss advertising slots operated by Métropole Télévision do not contravene legislation on either copyright or unfair competition. As a result, it will be able to continue broadcasting the M6 television channel using two separate satellite signals, one directed at the French audience, and the other carrying advertising directed specifically at Swiss viewers.

SSR contended that Métropole Télévision was not entitled to transmit a programme that incorporated Swiss advertising slots without authorisation from the holders of the copyright in the works being broadcast (particularly the films and television series for which SSR held exclusive broadcasting rights for Switzerland). SSR also felt that Métropole Télévision was gaining an unfair advantage in terms of competition by operating advertising slots without paying the necessary cost of acquiring broadcasting rights for Switzerland. On 12 February 2009, the civil court of appeal in Fribourg found in favour of SSR, judging that the broadcasting directed specifically at the Swiss public (and particularly by means of advertising slots) of audiovisual works for which Métropole Télévision did not have authorisation from the copyright holders to broadcast, violated Swiss legislation on copyright and unfair competition.

Métropole Télévision appealed against this decision, and the TF overturned it. On the basis of the theory of the broadcasting country acknowledged by European Directive 93/83/EEC, the TF holds that the originator of an audiovisual work may only decide whether or not to authorise the broadcaster to transmit the work by satellite; once authorisation has been given, the originator has no legal justification in preventing the work being received in the States covered by the satellite’s footprint. Thus the right to broadcast, exercise of which may be authorised by the work’s originator, only covers the injection of satellite signals carrying the work into the chain of communication; reception is in principle not something that is covered by Swiss law on copyright. This means that any violation of copyright can only take place in the broadcasting State.

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According to the TF, an exception to the principle of the broadcasting State is not justified in the present case, as the broadcasting of M6's "Swiss" signal does not have any real impact on the situation of the holders of the copyright in the audiovisual works. In fact, the Swiss and French signals for the M6 channel differ only in the content of their advertising, and the fact that the advertising during breaks in the works being broadcast is directed at a Swiss audience rather than a French one does not *per se* affect the integrity of the work. This is all the more true of advertising that precedes or follows the broadcasting of the audiovisual works. Neither does it matter that the contracts between Métropole Télévision and the producers and distributors of films and series do not include Switzerland in the authorised territories for broadcasting.

In conclusion, the TF felt that there was no reason in relation to the protection of originators or their beneficiaries for differential treatment of the two signals used by Métropole Télévision to transmit the M6 channel that would make the transfrontier broadcasting of audiovisual works via the signal incorporating Swiss advertising slots subject to authorisation. Such broadcasting did not require authorisation from the copyright holders, and consequently the "Swiss" signal did not infringe copyright. Lastly, the TF held that the broadcasting of the disputed signal did not contravene legislation on unfair competition either, as it did not constitute a violation of the rights of the licensors.

Arrêt du Tribunal fédéral n° 4A-203/2009 du 12 janvier 2010 www.bundesverwaltungsgericht.ch

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Federal Court decision no. 4A-203/2009 of 12 January 2010

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