[DE] Supreme Court Rules on Option Obligations under Film Production Agreements

IRIS 2010-4:1/14

Anne Yliniva-Hoffmann
Institute of European Media Law (EMR), Saarbrücken/Brussels

In a ruling of 21 January 2010, the *Bundesgerichtshof* (Federal Supreme Court - BGH) considered the conditions under which a film production company correctly meets its obligation to offer a so-called "final option".

In the case concerned, the plaintiff, a film production company, and the defendant, which is involved in film distribution and trading in film licences, concluded a contract in 2002, under which the defendant was granted exclusive rights to exploit the film "Der W.". The contract also granted a so-called "final option" to the defendant. This obliged the plaintiff to offer the defendant the right to publish a sequel to the film under the same conditions as would be offered to a third party. In 2005, the plaintiff offered the defendant the opportunity to publish a sequel, but the latter declined the offer. The plaintiff subsequently negotiated with other parties, including C. GmbH, which made a corresponding offer to the plaintiff. This offer, labelled the "Memo Deal", contained nine clauses and was sent by the plaintiff to the defendant with the message that this should be understood as the "final offer" as described in the 2002 contract. The defendant replied that it accepted the offer with regard to clauses 1 to 8 and would exercise its option right. The plaintiff subsequently signed the "Memo Deal" with C. GmbH. In the ensuing court proceedings, the plaintiff claimed that it had not concluded any licensing agreement with the defendant regarding the sequel and that it did not owe the defendant any compensation for breaching the option obligation.

The BGH upheld this claim, ruling that no licensing agreement had been concluded between the parties to the dispute due to the lack of concurring declarations of acceptance, since the defendant had not fully accepted the offer it had received (see para. 150(2) of the Civil Code - BGB). The "Memo Deal" had been sufficiently precise that it could be considered an offer in the sense of the option obligation. The BGH rejected the defendant's argument that the "Memo Deal" only outlined the main points, some of which were vague, and in particular that it did not provide for the "negotiated licensing of the rights". Although it was true that some of the details were not finally resolved in the document, it contained all the essential components of an agreement (parties, subject-matter, and services to be provided by each party) and therefore met the definition of a preliminary agreement. Such a preliminary agreement was a suitable means of correctly fulfilling option obligations such as those agreed in this case. This was backed up by the fact that short agreements such as this were common in the

© European Audiovisual Observatory (Council of Europe) 2026

film industry and that the defendant had initially even (partly) accepted the "Memo Deal".

Urteil des BGH vom 21. Januar 2010 (Az. I ZR 176/07)

http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=76fe285480f08a20e6f303f94d9a23aa&nr=51168&pos=0&anz=1

Ruling of the Federal Supreme Court, 21 January 2010 (case no. I ZR 176/07)

© European Audiovisual Observatory (Council of Europe) 2026

© European Audiovisual Observatory (Council of Europe) 2026