[DE] BGH Rules on Unauthorised Use of Film Images

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

In a recently published ruling of 19 November 2009, the Bundesgerichtshof (Federal Supreme Court - BGH) decided that the use of photographs taken in connection with the production of a film does not infringe the right of cinematographic exploitation enshrined in Art. 91 of the Urheberrechtsgesetz (Copyright Act - UrhG).

The defendant operates an online archive of around 400,000 photographs from various films, including some the rights to which are owned by the plaintiff, a film producer. These images can be viewed in thumbnail form and downloaded for a fee. The plaintiff argued that this service offered by the defendant breached her copyright-related rights over the photographs and film recordings under Arts. 72, 91, 94 and 95 UrhG and demanded compensation from the defendant.

The BGH partly rejected her claim. The plaintiff was not entitled to compensation due to a breach of the film producer's right of cinematic exploitation of the images. The BGH applied Art. 91 UrhG, which had been in force until 30 June 2002, because the films concerned had been produced before the currently applicable Art. 89 para. 4 UrhG entered into force on 1 July 2002. In this case, however, the images in question had not been "used either in the context of exploitation of a film or in the form of a film". The fact that the images had originated from films did not mean that their use automatically constituted "cinematographic exploitation" in the sense of the Act.

Regarding the right of non-cinematographic exploitation of the images (Arts. 72 and 2 para. 1 no. 5 UrhG), the BGH ruled that this belonged, in principle, to the photographers. Although the plaintiff had claimed that she had acquired the rights from the photographers, she had not provided sufficient proof that this was the case. However, the BGH upheld complaints submitted with the appeal, according to which the appeal court had made a procedural error by refusing the plaintiff's request to produce evidence that she had acquired these rights. Consequently, the BGH annulled the appeal court's decision and referred the case back for a new hearing and ruling.

With regard to the claim for compensation due to the breach of the film producer's rights over the film recordings (Arts. 94, 95 UrhG), the BGH noted that the plaintiff had only lodged this claim in the alternative, so it only needed to be considered if the main application was unsuccessful. However, as a precaution,

the BGH ruled that the subject of protection was not the "film recording as a tangible item, but the film producer's organisational and economic effort, embodied in the film recording". It thought that this would include acts of exploitation that did not make direct use of the film recording. The "economic value worthy of protection", which justified protection under Arts. 94 and 95 UrhG, was present in even the smallest part of a film.

Urteil des BGH vom 19. November 2010 (Az: I ZR 128/07)

http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=df81ca3401f6b8ef8e6bc2ca0b713282&nr=52132&pos=0&anz=1&Blank=1.pdf

BGH ruling of 19 November 2010 (case no: I ZR 128/07)