[DE] BGH Rules on Broadcasters' Claim against State

IRIS 2010-10:1/20

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

In a recently announced decision, the Bundesgerichtshof (Federal Supreme Court - BGH) decided that Article 87(4) of the Urheberrechtsgesetz (Copyright Act - UrhG), which prevents broadcasting companies from receiving a share of the appliance and phonogram tax provided for in Article 54(1) UrhG, does not represent a serious breach of Article 5(2)(b) of Directive 2001/29/EC and cannot therefore justify a claim against a state under EU law.

In the case concerned, the plaintiff, VG Media (collecting society for copyright and related rights of media companies) demanded compensation from the Federal Republic of Germany on behalf of the private broadcasting companies that it represents. It claimed that the exclusion of broadcasters from the group of beneficiaries of the appliance and phonogram tax put them at a disadvantage compared to the holders of other copyright-related rights and was incompatible with Directive 2001/29/EC. Article 2(e) of the Directive states that broadcasting organisations, in principle, held the reproduction right for fixations of their broadcasts. Article 5(2)(b) provided that rightsholders should receive "fair compensation" in respect of reproductions made for private use, which were exempt from the reproduction right. After both lower instance courts (LG and KG Berlin) had rejected the claim (see IRIS plus 2010-5), VG Media sought permission to appeal.

The BGH rejected this application. It agreed with the lower instance court that it could not be inferred from the wording of Article 5(2)(b) of the Directive that "fair compensation" should necessarily take the form of a financial payment. In particular with reference to recitals 31, 35 and 38, it was clear that the Directive, in principle, authorised different treatment of the rightsholders concerned. Member states enjoyed considerable freedom in this respect. Unlike the holders of copyright-related rights in the phonographic and film industries, for example, whose activities were directly affected by the right to make private copies, broadcasting organisations - in their function as such - were not affected in terms of their primary copyright-related right, i.e., the right to retransmit and make their programmes available to the public. At most, private copying therefore created only slight disadvantages for broadcasting organisations. In deciding how to distribute the revenue from the appliance and phonogram tax, the legislator had needed to achieve a fair balance between the rightsholders. As producers of films and phonograms, broadcasting organisations would receive a share of the tax revenue for private recordings. Any additional payment would be to the

disadvantage of the other rightsholders. Accordingly, there had therefore been no obvious, significant, and therefore serious breach of EU law.

Beschluss des BGH vom 23. Juni 2010 (Az. III ZR 140/09)

http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=e3353f6e9522d534241bdab79c717b23&nr=52656&pos=0&anz=1