[DE] BVerfG Finds Breach of Right to a Lawful Judge in Appliance Tax Dispute

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In a recently published decision, the Bundesverfassungsgericht (Federal Constitutional Court - BVerfG) quashed a ruling of the Bundesgerichtshof (Federal Supreme Court - BGH) concerning the so-called appliance tax for printers and plotters and referred the case back to the BGH.

The related procedure concerned whether printers and plotters constitute duplication machines, which are subject to the tax, under Article 54a(1) of the old version of the Urheberrechtsgesetz (Copyright Act - UrhG), which was valid until 31 December 2007. The VG Wort (Wort collecting society), which collects copyright fees on behalf of authors and publishers of literary works, wanted an importer of such devices to provide it with information about the type and number of devices it sold, together with recognition that it should pay the corresponding tax. The arbitration service of the Deutsches Patent- und Markenamt (German patent and trade mark office) and the lower instance courts had granted the claims. However, the BGH rejected the VG Wort's claims and quashed the lower instance decision. It did not consider printers and plotters to be devices designed to be used to duplicate works by photocopying or a similar process in the sense of Article 54a(1) of the old version of the Copyright Act (see IRIS 2008-8: 9/13). The VG Wort complained that this ruling was unconstitutional, claiming that it breached Articles 3(1), 14(1), 101(1)(2) and 103(1) of the Grundgesetz (Basic Law - GG).

The BVerfG agreed that Article 101(1)(2) GG, establishing the basic right to a lawful judge, had been breached. The BGH had wrongly failed to consider whether it should refer the matter to the ECJ under Article 267(3) of the Treaty on the Functioning of the European Union (TFEU), even though certain aspects of Directive 2001/29/EC suggested it might be necessary in this case. For example, Article 5(2) of the Directive did not distinguish between analogue and digital originals, but only took into account the results of the reproduction process. It was therefore open to question whether the concept of a "process having similar effects" (letter a) could be interpreted as including only reproductions of analogue, but not digital originals, and therefore did not require compensation to be paid in the case of digital originals. If the BGH's ruling were followed, in which reproduction using printers/plotters was not considered as being such a process, it remained to be seen whether Article 5(2)(b) of the Directive ("reproductions on any medium") should apply. Despite the broad freedom given to member states

to implement the Directive, these questions had an important bearing on the decision; there were no obvious exceptions to the obligation to refer matters to the ECJ, and the BGH had not considered such a step. By failing to check whether it should refer the case to the ECJ, the BGH had denied the plaintiff its right to a lawful judge. The BVerfG also indicated that the BGH should now examine the extent to which, under Article 14(1) GG (basic right to property), Article 54a of the old version of the UrhG should be interpreted in such a way that the right to compensation should be granted, thus potentially rendering the referral of the matter to the ECJ unnecessary in this case.

Beschluss des BVerfG vom 30. August 2010 (1 BvR 1631/08)

http://www.bundesverfassungsgericht.de/entscheidungen/rk20100830_1bvr163108.html

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