[DE] DPMA Decides that VG Media Does Not Need to Grant Rights to Operate an Online Video Recorder

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According to reports, the Deutsche Patent- und Markenamt (German Patent and Trade Mark Office - DPMA), in its function as the regulator of collecting societies, published a press release on 10 September 2010, in which it considered the extent to which the rights exercised by the Gesellschaft zur Verwertung der Urheber- und Leistungsschutzrechte von Medienunternehmen (media collecting society - VG Media) covered the use of online video recorders (OVR).

In this context, it should be mentioned that the nature of the rights connected with the use of an OVR does not appear to be clearly defined. In its judgments of 22 April 2009 in the cases ProSiebenSat.1 v. Shift.TV (case no. I ZR 215/06), RTL v. save.tv (case no. I ZR 175/07) and RTL v. Shift.TV (case no. I ZR 216/06), the Bundesgerichtshof (Federal Supreme Court) made it clear that the retransmission right enshrined in Article 20 of the Urheberrechtsgesetz (Copyright Act - UhrG) was more relevant in such cases than the right to make works available to the public enshrined in Article 19a UrhG. However, this should be examined on a case-by-case basis, taking into account the technical characteristics of the service concerned (see IRIS 2010-9/17 and IRIS 2009-7/9).

The DPMA's decision followed a complaint by an OVR operator, which had accused VG Media of failing to meet its obligation to contract, set out in Article 11(1) of the Urheberwahrnehmungsgesetz (Act regulating collecting societies), by refusing to grant it the necessary rights to operate an OVR. VG Media had argued that the retransmission right linked to the operation of an OVR was not covered by the collection agreement that had been concluded with the broadcasters.

In the DPMA's opinion, the "purpose of grant" rule contained in Article 31(5) UrhG applies in this case. According to this provision, the scope of granted rights, if the types of use are not individually specified when they are granted, should be limited to the types of use necessary for the fulfilment of the purpose of the agreement. In this connection, the DPMA held that the retransmission of programme signals by the OVR operator to a server storage area allocated to an individual user represented a separate type of use that was not specifically listed in the collection agreement. This type of use was not covered by the purpose of the agreement. The purpose of a collection agreement was to exercise rights that the rightsholders could not exercise themselves. However, it could be assumed

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that the broadcasters were able to exercise the corresponding retransmission rights themselves. Also, since some broadcasters wanted to operate OVR-type services themselves, it should be assumed that they would not have signed the collection agreement with VG Media if it had specifically referred to OVR retransmission and a related obligation to contract. It could therefore not be assumed that the rights in question had been transferred to VG Media.

On these grounds, the DPMA thought that VG Media's refusal to grant the complainant the rights to operate an OVR was legitimate and ruled out the possibility of intervention under regulatory law.

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