[DE] BVerfG Rules on Dispute over Hyperlink to Software for Circumventing Copy Protection Systems

IRIS 2012-3:1/15

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On 15 December 2011, the Bundesverfassungsgericht (Federal Constitutional Court - BVerfG) decided that it should not rule on a complaint by several music industry representatives against a judgment issued in a copyright dispute by the Bundesgerichtshof (Federal Supreme Court - BGH) in October 2010.

The case concerned an article published in 2005 by the defendant, a publishing house, in its online news service concerning a named piece of software that could be used to decode DVD films and circumvent copy protection software. As well as a warning that such activities were prohibited in Germany and Austria, the article contained a hyperlink to the website of the software provider concerned, from which the software could be downloaded. The plaintiffs claimed that this form of reporting infringed their DVD rights and demanded that the publisher remove the link. Their demand was upheld by the Landgericht München (Munich district court) and Oberlandesgericht München (Munich regional appeal court) under the rules on liability for aiding and abetting enshrined in Articles 823(2) and 830(2) of the Bürgerliches Gesetzbuch (Civil Code - BGB) and Article 95a(3) of the Urhebergesetz (Copyright Act - UrhG) (see IRIS 2005-9/12). However, the BGH largely overturned these decisions and rejected the complaint with reference to the overriding rights of free expression and media freedom under Article 6 of the EU Treaty, Article 11(1) of the Charter of Fundamental Rights and Article 5(1) of the Grundgesetz (Basic Law - GG).

Regarding the complaint that this ruling breached Article 14(1) GG (protection of intellectual property), the BVerfG held, firstly, that on account of a lack of relevance to constitutional law and a low chance of success, it should not rule on the complaint.

The BVerfG explained that, since there was no explicit legal regulation on the admissibility and limitations of hyperlinks, the opposing fundamental rights in this case had to be weighed up on the basis of the press and copyright law benchmarks recognised in case law. The crucial provisions here were German fundamental rights, on which the responsibility of the BVerfG was based. Since the relevant Directive 2001/29/EC did not grant the member states any freedom regarding its implementation, the provision of Article 95a UrhG itself should be measured against EU fundamental rights and, if there was any doubt, it should be submitted to the ECJ in accordance with Article 267(3) TFEU. In the present case,

however, it was necessary to consider whether the granting of an injunction under the principle of liability for aiding and abetting in connection with Article 95a UrhG stood in the way of the basic rights of the publishing house. Since Directive 2001/29/EC did not contain any fully harmonising provision regarding this weighing up of interests, the process needed to be based on the Grundgesetz. The BVerfG had no reservations about the BGH's decision, particularly since there was little scope for it to examine the outcome of a court's weighing up process. In this connection, the BVerfG pointed out that the BGH was therefore right to consider that the provision of a link in an online article was protected under Article 5(1) GG. The discussion process necessary for the formation of opinion, protected by Article 5(1) GG, included private and public information about third-party statements, and also therefore the purely technical distribution of such statements, regardless of any associated expression of opinion by the distributor itself.

Beschluss des BVerfG vom 15. Dezember 2011 (Az. 1 BvR 1248/11)

http://www.bverfg.de/entscheidungen/rk20111215_1bvr124811.html