[DE] Unauthorised Use of EPG Programme Information Breaches Copyright Law

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In a recently published judgment of 27 March 2012, the Bundesgerichtshof (Federal Supreme Court - BGH) decided that text and images made available by a television broadcaster to advertise programmes via an electronic programme guide (EPG) are protected under copyright law and cannot therefore be used by third parties without the copyright-holder's permission.

The legal proceedings were instituted by a collecting society that looks after the copyright of several broadcasting companies, against the provider of an EPG that was free to use and funded through advertising. The defendant was accused of regularly downloading programme information (text and images) without the plaintiff's consent from the relevant press pages of the broadcaster's website, saving it and making it available for the public to download from its own web servers as part of a service funded through advertising. The plaintiff argued that the defendant should not be allowed to generate advertising income by using third-party programme information that was protected by copyright, rather than through its own efforts.

In its decision, the BGH agreed with the lower-instance appeal court (Oberlandesgericht Dresden - Dresden court of appeal, ruling of 15 December 2009, case no. 14 U 818/09) and granted an injunction under Article 97(1) of the Urheberrechtsgesetz (Copyright Act - UrhG). The copying of text and images could not be considered permitted as reporting on daily events in the sense of Article 50 UrhG, which did not apply because the information could not be accessed during the programme itself. This provision should be interpreted in its narrow sense and therefore did not cover the possibility of "indirectly" accessing the programme content summarised in the text, which the defendant had mentioned in its defence.

In the present case, the copyright-holders had not granted permission. In the BGH's opinion, it would have been both possible and reasonable for the defendant to obtain the copyright-holders' permission before copying the text and images from the aforementioned press pages.

Weighing up the opposing basic rights, the BGH explained that the public's right to information, referred to by the defendant, and the broadcasting company's

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vested interest in advertising for its television programmes would also have been safeguarded if the EPG provider had accessed the broadcaster's copyright-protected programme information with the copyright-holder's permission and in return for payment in order to report on its television programmes.

However, the BGH disagreed with the appeal court in one respect. The latter had wrongly assumed that the defendant could not argue that the ban on discrimination enshrined in Article 20 of the Gesetz gegen Wettbewerbsbeschränkungen (Act on Restraints of Competition - GWB) had been infringed on the grounds that the rightsholders had refused to provide it with the text and images free of charge. The OLG Dresden had found that potential breaches of cartel law were not subject to civil court decisions, but could only be investigated by the supervisory authority under Article 18 of the Urheberrechtswahrnehmungsgesetz (Copyright Administration Act - UrhWG). The BGH disagreed, ruling that supervision under Article 18 UrhWG did not block the path to the ordinary courts. It also noted that the plaintiff allowed magazine publishers to use the material free of charge, which was therefore discriminatory. Since the appeal court had failed to provide sufficient reasons to justify such discrimination, the BGH quashed the lower-instance decision and referred the case back to the appeal court for a new decision.

Urteil des BGH vom 27. März 2012 (Az. KZR 108/10)

http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&az=KZR%20108/10&nr=61327

BGH decision of 27 March 2012 (case no. KZR 108/10)

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