[DE] Dresden Appeal Court Confirms Inadmissibility of "VFF Clause"

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In a ruling of 12 March 2013, the Oberlandesgericht Dresden (Dresden Appeal Court - OLG) declared the use of the so-called "VFF clause" in contracts between public service broadcasters and commissioned television film producers illegal and therefore upheld the first-instance judgment of the Landgericht Leipzig (Leipzig District Court - LG) of 8 August 2012 (see IRIS 2012-9/17). The disputed clause was regularly used in relation to commissioned productions. It allows commissioning broadcasters to claim for themselves all remuneration owed to the film producer by third parties. The OLG also considered that this put the film producer at an unreasonable disadvantage.

Like the LG before it, the OLG thought that an unreasonable disadvantage was created by the fact that the clause, used as a standard business term in the sense of Articles 305 et seq. of the Bürgerliches Gesetzbuch (Civil Code - BGB), was incompatible with the essential principle, enshrined in the Urheberrechtsgesetz (Copyright Act - UrhG), that film producers held copyright-related rights. The film producers' right to choose which collecting society to use was also excessively restricted, since they were required to use the Verwertungsgesellschaft der Film- und Fernsehproduzenten GmbH (Film and Television Producers' Collecting Society - VFF). The defendant in the original procedure, Mitteldeutscher Rundfunk (MDR), appealed against this decision. As the plaintiff in the the original procedure, the Arbeitsgemeinschaft Dokumentarfilm (German Documentary Association - AG DOK), which represents documentary film producers, was also a party in the appeal procedure.

Although MDR used a wide range of arguments to defend the legality of the VFF clause, its appeal was rejected.

The OLG also explained that the VFF clause was not sufficiently clear in the sense of Article 307(1)(2) BGB. The clause entitled the commissioning broadcaster to half of the proceeds, without specifying which proceeds were actually being referred to. The OLG thought the need to interpret the clause could result in further disadvantages for film producers.

The OLG otherwise repeated the LG's comments, particularly concerning the unlawfulness of the clause, which puts film producers at an unreasonable disadvantage by contravening the basic principle, enshrined in the UrhG, that

remuneration rights are held by the film producer and cannot be assigned in advance (Articles 94(4), 20b(2), 27(1) and 63a).

Urteil des OLG Dresden vom 12. März 2013 (Az. 11 U 1493/12)

http://www.kvlegal.de/wp-content/uploads/2013/03/urteil-11U1493-12-geschw%C3%A4rzt.pdf